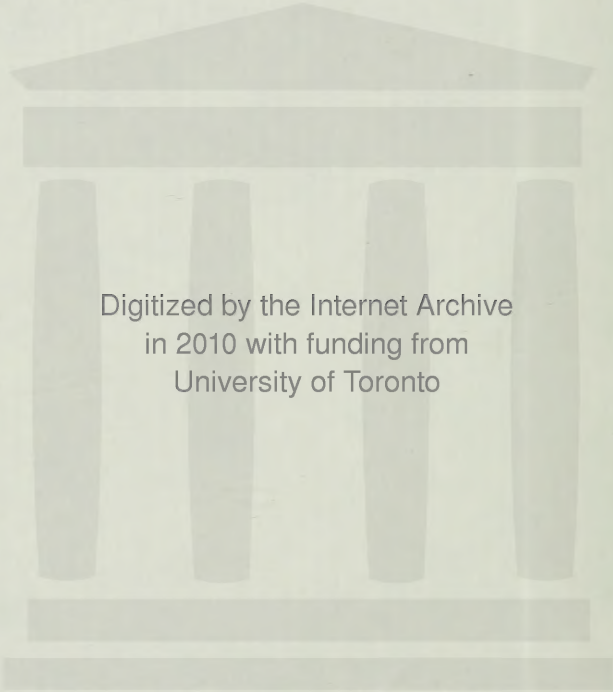

EQUITY IN ROMAN LAW

Faculty of Laws

EQUITY IN ROMAN LAW

LECTURES DELIVERED IN THE UNIVERSITY OF LONDON, AT THE REQUEST OF THE FACULTY OF LAWS

BY

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PREFACE

THE following pages contain, in substance, a course of three lectures, delivered by me, at University College, London, under the auspices of the Faculty of Laws of the University of London, in January and February of the present year. The matter has been rearranged and somewhat amplified by the inclusion of some topics which were omitted in the lectures for want of time.

I have attempted to show the essential kinship, not of the Roman and the English law, but rather of the Roman and the English lawyer. To this end I have chosen a number of "Equitable" notions, and have sought to show how the Roman lawyer, in the main without the help of legislation, modified the law in directions almost identical with those followed, as it seems quite independently, by our Equity Courts. I have appended some remarks on the study of Roman Law, which will probably not meet with general acceptance.

The treatment of the matter is of necessity slight, but I am not without hope that this examination of the Roman Law from a somewhat unusual point of view may prove to have some interest for English lawyers, whether they are or are not specially interested in the Roman Law.

All propositions of Roman Law are, I hope, supported by adequate textual authority, though considerations of space have prevented me from printing the actual texts. On the other hand, as the equitable notions considered are of course of an elementary character, I have not thought it necessary to support them by references to the Reports. But it is easy to state an elementary principle wrongly, and I am much indebted to my friend, Mr. W. J. Whittaker, of Lincoln's Inn, for help in this matter. In those passages which he has not seen, I hope I have not strayed far from the right road.

W. W. B.

Gonville and Caius College,
Cambridge, June 1911.

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EQUITY IN ROMAN LAW

CHAPTER I

INTRODUCTION

By the expression "Equity in Roman Law" it is intended to indicate traces in the Roman Law of particular doctrines which have been introduced into our law, or at least given their full scope in our law, through the agency of the jurisdiction of the Chancellor and his subordinates. We shall not find in the Roman Law a system of rules developed gradually by a permanent tribunal whose function it was to give relief which for any reason could not be obtained in the ordinary courts. The Praetor, whom we commonly, but not altogether accurately, regard as the main source of Roman Equity, presides over all ordinary civil courts. A distinction can indeed be made between his well-known function of issuing a *Formula* to be tried by a *iudex*, and his *Cognitio*, *i. e.* his power, in certain cases, of himself deciding the issue. It is indeed in connection with this *Cognitio* that we shall find some of the most characteristic parts of Praetorian Equity, but much of it, particularly much of the later development of it, is mere matter of convenience. The

Emperor decides that the type of case is to be tried by the Praetor, though it might, in many cases, have been tried just as well by the ordinary method. (See Bethmann-Hollweg, *Civilprozess*, § 122.) This is true, for instance, of *Fideicommissa*, of *Honoraria*, of claims for aliment as between, *e. g.* patron and *libertus*, and some other cases. Some of these, *e. g. fideicommissa*, have a further specious resemblance to Equity jurisdiction. They were adjudicated on by a special tribunal which was not a court of ordinary jurisdiction, the court of the *Praetor Fideicommissarius*. But the point which must be regarded as excluding them all is that, however equitable the ideas they introduce may be, they are really cases of law reform, introduced by the supreme legislative machinery, not by the Praetor or the jurists. If the Praetor had himself introduced *Fideicommissa*, they might perhaps have been regarded as his equitable notions, without reference to the mode of trial. Thus, the republican cases of *Cognitio*, such as *Restitutio in Integrum*, *Missio in Possessionem*, and the like, appear to be, in an admissible sense, equitable notions, and we shall have to recur to them. But, here too, it must not be forgotten that the Praetor having once satisfied himself that a *Missio* or *Restitutio* is called for, and issued his *decretum* to that effect, did not himself try any litigation which resulted: he issued a *formula* which went before the ordinary *iudex*, in such a form as to require him to take account of the previous *decretum*

(Girard, *Manuel*, 1058). The same state of things arises in those cases in which the Praetor, in his Edict, declares that he will give a certain *actio* or *exceptio*, "*causa cognita.*" Here, though the grant of the action or defence is entirely in the hands of the Praetor, it is not he, but the ordinary *iudex*, who presides over the resulting proceedings. The equitable nature of the relief has nothing to do with that of the ultimate tribunal. There is no such thing as an "Equity Court."

In like manner, we shall look in vain in Roman Law for any such rule as that which underlies all our Equity principles, that "Equity acts *in personam.*" When we have said that Equity in Rome does not correspond to any special tribunal, we have also said, in effect, that there can be no such limitation on its mode of action as is involved in this principle. There is nothing at all corresponding to the Writ of *Subpoena.* It is of course to be expected that there would be many cases in which the rule laid down is declared to be established because its absence would enable something to be done which is against good conscience. Some cases of this kind we shall have to deal with. But nowhere is there any sign of a special duty on the Praetor, or any other administrator of the law, to deal with persons who do injustice under cover of legal right, by methods which put pressure on the conscience of the wrongdoer. That is to say, his remedies are not necessarily or even mainly, *in personam.* The *Actio*

Publiciana which is the remedy for what is commonly regarded as Equitable Ownership in Roman Law is essentially an *actio in rem*, and there is no hesitation, at least in later law, in so describing it. Some of the actions for rescission of inequitable transactions are *in rem* (Inst. iv. 6. 6), some *in personam* (*e.g. Actio Pauliana*). The point is well brought out by the rules of the *Hereditatis Petitio Possessoria*, the definitive remedy for a person who has received a grant of *Bonorum Possessio*. We know that in some cases the *Bonorum Possessio* is "*sine re*," *i.e.* it is not effective against the true *heres*. In such a case, the *bonorum possessor* can indeed get possession from the *heres*, by the interdict *Quorum Bonorum*. But if the *heres* now brings *Hereditatis Petitio* against him, he has no defence. And if, in the first instance, the *bonorum possessor*, instead of using the Interdict, had brought *Hereditatis Petitio Possessoria* against the *heres*, he would have failed. At first sight therefore the case looks very like that of a *bona fide* purchaser for value, from a trustee, without notice of the trust. He, and he alone, is not bound by the trust. So, too, in the case supposed, the *heres*, and the *heres* alone, is not effectively bound by the grant of *Bonorum Possessio*. But if we look at the machinery, we shall see that the point of view is entirely different. The cestui que trust in England would assert an obligation, binding on the holder, to deal with the property only in certain ways and for the benefit

of the cestui que trust. The answer of the *bona fide* purchaser would be: "on the facts I am under no such obligation." But the Roman *bonorum possessor* asserts a *ius in rem.* So much is clear, though we do not with certainty know what was the form of his action, or even, indeed, whether it existed in the classical law, though there is little doubt on this point. It is clear from the language of Gaius, or attributed to him in the Digest, that the action of the *bonorum possessor* is an *actio in rem* like the true *Hereditatis Petitio.* The defence of the *heres*, where the *Bonorum Possessio* was "*sine re*," was, as it seems, an *exceptio* (commonly thought to have been the *exceptio doli*), or its equivalent. "It is true," he says, "that you have a right, but it is inequitable to enforce it against me." The position of the parties is exactly reversed: it is the *heres* who is claiming protection against a right which he acknowledges to exist. His is a civil law right: it is his opponent who claims equitable rights, and they are rights *in rem.*

It is natural in speaking of equity at Rome to think of the Praetor as its chief source. In this capacity we have to think of him not as a judge, but as a lawmaker. The changes which he makes are to a great extent, though not entirely, introduced by way of express legislation. These pieces of legislation express indeed equitable ideas, but so does other Roman legislation. So does much modern English legislation. There is no very

close analogy with the gradual, sometimes almost unnoticed, action of the Court of Chancery. But although it might be possible to regard the Praetor's Edict as a form of express legislation, tending merely, as all legislation in a well-regulated community naturally will, to the triumph of equitable principles, the texts make it clear that the Praetor was contemplated as having, and as being bound to have, a special leaning towards equity. When Ulpian says (D. 1. 18. 6. 2) that it "*pertinet ad religionem praesidis*" to protect the weak against the strong, he is only saying what is equally true of the Praetor, though of course the need for the reminder may have been greater in a remote province. *Accessio possessionum*, by which successive possessors may under certain rules add their times together for the purpose of Usucapion, is an edictal matter, and we are told by Scaevola, that it is purely equitable: "*consistit*," he says, "*in sola aequitate*" (D. 44. 3. 14. *pr.*). The Praetor's power of giving *Restitutio* for absence is in his sole discretion (D. 4. 6. 26. 9. Ulpian). The action against a *libertus* for damaging the *hereditas* before it has been accepted is an edictal creation, and Ulpian tells us that the words of the Edict are to be interpreted widely "*pro utilitate*" (D. 47. 4. 1. 10). So too Paul lays it down generally, but not very helpfully, that in a case in which either *dubitatio iuris* or *naturalis ratio* is against the equity of a claim, the matter is to be arranged *iustis decretis* (D. 50. 17. 85. 2).

If, however, we are to look for praetorian action most closely analogous to that of the Court of Chancery, we shall find a more promising field outside the Edict. The grant of an *actio utilis* for which there was no corresponding rubric in the Edict, is far more like the practically legislative work of modern equity. Still more like it are the cases, not very numerous, of actions and defences allowed by the Praetor only *causa cognita*, in regard to which he was to a certain extent released from the bonds of his own Edict. We know only very imperfectly the conditions under which he gave these reliefs. The well-known extensions of the *actio Aquilia*, are rather remote from our equity notions, but they give an excellent illustration of this topic. The Praetor gave a remedy in many cases which were clearly quite outside the Statute. The limits of this remedy are expressed by the grant or refusal of an *actio utilis*, either *in factum* or *fictitia*. (We need not consider the controversies. which exist as to the exact relation of these actions, and as to the exact scope of the expression *actio utilis* in this connection.) The issue of the *formula* is the Praetor's act, done at his own discretion, and he is not hampered in his issue of new writs by the jealousy of a rival jurisdiction, such as troubled the Chancellor (Spence, *Equitable Jurisdiction*, i. 410, *sqq.*; Kerly, *Hist. of Equity*, ch. iv.). But it is impossible to read the title on the *lex Aquilia* (D. 9. 2., made readily accessible to English readers by Dr. Grueber and by the late Mr. Monro), with-

out seeing that it is not really the Praetor who sets these limits. They are the subject of continual discussion among the lawyers, and they are settled by the "*disputatio fori*." It is the succession of great jurists who must be considered as the real authors, not only of these rules, but also of the great majority of those which we shall have to consider. The age of the Antonine jurists is one in which the Praetor has ceased to legislate, and in which the settled opinions of the jurists are to some extent themselves authorities binding on the *iudices*. Thus the writings of the jurists will give us the best indications of the growth of equitable conceptions and equitable rights. It is indeed the Praetor who forges equitable remedies, but these are of an earlier creation than many of the rules we shall have to state. Where the English lawyer refers the court to a case, the Roman lawyer referred him to Papinian, or to some other great exponent of the law. Even apart from any officially binding character it may have had, the opinion of one of the great masters of the law can hardly have been less operative on the mind of the *iudex*, who need not have been, and, as it seems, usually was not, a skilled lawyer, than is a decided case on the modern subtle highly trained equity judge.

We shall then find our chief source, not in the Praetor but in the jurist, not in the Edict but in the commentary. But the intervention of the Emperor himself must not be disregarded. Several of the Emperors played a conspicuous part in the

development of the law, and, as might have been expected, they were not trammelled by any excessive reverence for established rules and usages. Cases might come before the Emperor in many ways. He might be sitting in his capacity as magistrate to deal with a case in first instance. He might be sitting in Appeal. He sat with a *Consilium* which consisted, in part, of the leading jurists of the time, but they did not form part of the court. The judgment was in the form of a *decretum*, and however much the Emperor might be guided by the opinions of his council the decision was his own. We shall shortly meet with cases in which the Emperor gave a decision running counter to the opinion of the court which tried the case, and of the lawyers in his council. It is not indeed clearly proved that there was any such appeal in cases which were tried in the ordinary way by *formula*, but the system of trial by *Cognitio* was rapidly developed under the earlier Emperors. It early became, however, the usual course for the Emperor to refer these appeals to a special officer for hearing, who was said to hear them as a substitute for the Emperor. As appeals in our sense were a new idea under the Empire, and as, moreover, the Emperor was the highest of several possible courts of appeal, it is hardly to be doubted that many of these appeals were on other than strictly legal grounds. Many of them were more like petitions. The analogy with what happened in regard to petitions for the King's grace, that is to

say, reference to the Chancellor, is therefore fairly close, but it cannot be said that anything like a system of jurisprudence grew out of it in Rome. There was another and perhaps more important way in which cases might come before the Emperor and his *Consilium*. Officials of various sorts were constantly writing to him for instructions as to the settlement of doubtful points which had arisen in cases before them. This is not appeal, since it is an act of the Court, not of the parties. The answer would normally be in the form of a *rescriptum*, and it is well known that these rescripts were the source of a great number of important legal institutions.

M. Cuq, in his monograph on the Conseils des Empereurs (pp. 430 *sqq.*), gives a full and excellent account of the activity of the Flavian and Antonine Emperors in this connection, and every student knows how frequently the names of Hadrian and Antoninus Pius recur in the Institutes both of Gaius and of Justinian. From the accounts which have come down to us it is sometimes impossible, and it is rarely easy, to tell in what form the matter came before the Emperor, but for our present purposes, this is of small importance. Augustus heard criminal appeals, or rather delegated the hearing of them to subordinates, but it is not till a good deal later that we hear much of the Emperor in connection with the hearing of appeals in civil causes. Suetonius, in his life of Claudius (14, 15) deals with his activity in this connection at such relative length as to suggest that he made a

regular practice of it (so indeed the author says), and that this was a novelty. He tells us that Claudius tempered the severity of the law, *ex bono et aequo*, a very familiar collocation of words (Cicero, *Ad Att.* 7. 7. and *passim*), already proverbial in the Republic (Cicero, *Part. Or.* 129, "*et, ut dicitur, aequum et bonum*"), destined to become in the form "*ars boni et aequi*" (D. 1. 1. 1. *pr.*, Ulpian, quoting Celsus) an accepted equivalent for *Ius*, and constantly employed to express equitable leanings in the administration of the law. (See the numerous references in Brissonius, *de Verb. Significatione, s.v. Aequus.*) The reference in Suetonius is primarily to criminal matters, the remission of fines and the like, but he gives us illustrations of the same thing in civil causes. He tells us that Claudius gave plaintiffs who had lost their actions, by reason of *plus petitio*, licence to renew their claims. He refused to put on the roll of *iudices* persons who had not claimed an exemption to which they were entitled, observing that he did not like this *cupiditas iudicandi*, a touch which recalls *The Wasps*. Suetonius adds that many of his decisions were sound and sagacious, but that occasionally he acted like a madman, a proposition of which he gives entirely adequate illustration, which serves also to show that it was Claudius who was acting and not his *Consilium*.

The more trustworthy evidence of juristic texts refers to later Emperors. It is worth while to give a few illustrations to show both the

important advisory part which the *Consilium* played in the matter and also the freedom with which the Emperor, if he thought fit, both disregarded legal principle and overruled his legal advisers. In a case in which judgment had been obtained by perjury, Hadrian, on petition, besides ordering punishment of the offenders, directed that the case should be reheard (D. 42. 1. 33, *Restitutio in int.*). This does not seem to have been in accord with the law of the time. Julian, probably a member of the *Consilium*, writing at about that time, and dealing with an analogous case, tells us that the proper remedy is *actio doli* (D. 4. 3. 20. 1). Paul, writing much later, dealing with a case like Julian's, suggests a renewed action, and if *res iudicata* is pleaded, a *replicatio doli*, which is an indirect way of getting *restitutio in integrum* (D. *h. t.* 25). It is not, however, clear that the cases discussed by Julian and Paul were cases of perjury: they were probably misleading statements not under oath. About the time of Paul, Severus seems to have ordered *Restitutio* in case of perjury, and from the time of Alexander, this seems to have been the usual course (C. 7. 58). But even Diocletian allows only the *actio doli*, where important documents have been concealed by one of the parties, so that a wrong judgment has been given (C. 2. 4. 19). In another case an infant heiress applied to the Praetor for *Restitutio in integrum*, in respect of certain steps taken by her *tutor* under a contract of her father's. The

classical law knew of no restitution on such grounds, since her remedy was obviously against her *tutor*. Accordingly the Praetor refused to order it. She appealed to the *Praefectus Urbi*. He also refused. Thereupon she went to the Emperor's *Auditorium*. Paul advised the Emperor that there was no case for recission, but the Emperor, observing that he did not like one of the terms in the contract, granted her request (D. 4. 4. 38). In later law, *restitutio in integrum* for acts of the *tutor* is common enough (C. 2. 24. 3). In another case Paul states the view of himself, and apparently of the *Consilium*, that a judgment should be set aside, but adds that the Emperor upheld it, for reasons which he gives (D. 14. 5. 8).

Most of the cases recorded arose under wills. In one of them the discussion in the *Consilium* is recorded, Paul taking one view, and Papinian another, which the Emperor adopted. Another case is of special interest. A testator, hearing that his *heres institutus* is dead, proceeds to make another will, instituting *Titius*, and adding the reason " because I cannot have the *heres* I wanted." The man is not in fact dead. The Emperor holds, in effect, that this is only a dependent conditional revocation, and that the first will is good. So far this is straightforward, and resembles the decisions of our own courts (Giles *v.* Warren, 2. Pr. & M., 401). But the Emperor goes on to decide that legacies under the second will are good, which is inconsistent with principle, for the second will

could be no more than a codicil, so that gifts in it could operate only as *fideicommissa*, apart from confirmation, of which there is no hint in the text (D. 28. 5. 93). Another text, of Marcellus (D. 28. 4. 3), gives a very good account of a discussion before Antoninus Pius of the effect of intentional erasure of the name of the *heres*. On principle the will must have been void, but the Emperor decrees that it is all to be upheld, except what is erased. This, itself, is, as the lawyers said, a departure from principle, since a will without an *institutio* is a nullity. But the Emperor went further, and decided, on grounds of *favor libertatis*, that a certain manumission was to be good, even though it had been intentionally erased. This, and other cases (*e. g.* D. 29. 4. 21 and D. 36. 1. 23. *pr.*), show how freely the Emperor was disposed to deal with principle, even in the greatest age of the law. But this sort of thing could not develop into a system of Equity. These are decisions of Cadi justice, and though they are incorporated into the Digest, it is difficult to see how they could ever have been used as authorities.

Some doctrines which have played a large part in Equity we must not expect to find in Rome. Two of these may be mentioned here. One is the equitable doctrine of Conversion, the rule, as stated by Bowen, L.J. (Att. Gen. *v.* Hubback, 13 Q.B.D. 289, cited Ashburner, *Equity*, 346), that " when money is directed or agreed to be turned into land, or *vice versa*, Equity . . . impresses on

the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted." No such rule was likely to develop itself in a system which did not distinguish between land and other forms of property in its law of succession on death.[1]

So too, we shall not find the trust, as a general institution, in Roman Law: of this conception it is common knowledge that the Roman Law and the systems derived from it possess no parallel. As Maitland has said, the analogy between the English double ownership, so-called, and the Roman, cannot be pushed below the surface. There is nothing fiduciary about the Roman notion. No doubt cases might occur in which the transferor, on making delivery, agreed that on some future day, when, *e. g.* the necessary five witnesses could be got, he would make a formal *mancipatio.* But if he did so agree and failed to do it, this was a mere breach of contract. In the

[1] It is difficult to say whence the idea came into our law, and modern historians of Equity do not help us. Mr. Kerly (*op. cit.*, 202) traces the rule in our law back to the reign of Charles I. Whether it was then new in England or not, it was certainly recognised in France long before that date. Probably it would soon develop in any refined system which distinguished in succession between land and moveables. In any case it is to be found in the customs of Maine, Anjou and Paris long before. For the class of Immeubles par destination, which Sir Henry Maine appears to confine to Fixtures and the like (*Early Law and Custom*, 336), extended to certain gifts of money as to which there was a direction in the gift that it was to be invested in land. The conversion of land to moveables is also found in old French law. See Viollet, *Histoire du Droit Français*, 529.

common case of Sale it is not absolutely clear (the matter is the subject of controversy) that he was under any such duty. His obligation was to give vacant possession and a guarantee against eviction, and this he has done. In any case, the bonitary owner is not in the least concerned with any further *mancipatio* of the property which the vendor may make to a third person. His title is secure: it is the third person who will have ground of complaint, whether he has or has not notice of the earlier conveyance. If the outstanding interest is the legal estate, it is the driest legal estate which can be imagined. The *dominus* has no rights in the thing, and in two years at most his simulacrum of a right passes out of existence. In one sense the outstanding *dominium* of the Roman Law resembles feudal lordship in its modern form over freehold rather than the legal estate. It affects the language both of conveyancing and of litigation, and it does little or nothing else. It is even emptier than the feudal lordship, for if the transferee dies without representatives, the property does not escheat to the *dominus*: it passes to the State, exactly as it would if the deceased were *dominus*. The position of a *bona fide possessor*, who, under the same system of the *actio Publiciana*, has the remedies of an owner against all but the true *dominus* is a little more like that of a cestui que trust, but there is nothing fiduciary in the position.

It is noticeable that under these rules there may

be two or even more persons, each entitled to the *actio Publiciana*, and of these it may happen that one is in possession. The question then arises which of these two is entitled to recover from the other. The matter is considered in very few texts, but the decisions arrived at show an interesting analogy, it is no more, with certain well-known solutions in Equity of questions of priority in Mortgage. If one holds from the *dominus*, *i. e.*, is bonitary owner, while the other holds from a third person, and is thus a mere *bona fide* possessor, the former will prevail, both as a plaintiff and defendant. Their equities are equal, but, as one holds from the true owner, he is preferred, even though he may be the later. If both are bonitary owners, as may conceivably be the case under certain conditions, then the one who first received *traditio* is preferred. The *traditio*, not the contract, provides the critical date. The contract gives a pure *ius in personam*, and is immaterial, as against third persons. If both of them are mere *bona fide* possessors, and they hold under the same person, the first to receive *traditio* is preferred. No later transfer by the former owner could derogate from the grant he had made. If they hold under different persons, the actual holder is preferred, irrespective of dates: their equities are equal, and "*in pari causa melior est conditio possidentis.*" An older view, which is expressed by Neratius, made priority of *traditio* always decisive as between rival *bona fide* posses-

sors. But it is clear that the other view, which has the high authority of Julian and Ulpian, was the rule of later law (D. 6. 2. 9. 4; D. 19. 1. 31. 2; D. 20. 4. 14. See for a full discussion of this matter, Appleton, *Propriété Prétorienne*, ch. xvii.).

The curious double ownership involved in the Roman system of *Dos* provides an analogy, though not a very close analogy to our Trust. We find that even in the classical law, which does not admit of limited or terminable ownership, the husband is *dominus* of the *Dos*, though his right lasts only during the marriage, and, in normal cases, the *Dos* passes to the surviving wife. She has a sort of deferred ownership. The difficulty of harmonising this with accepted doctrines led to attempts on the part of the lawyers to explain the situation in terms which did not give the husband *dominium*. Tryphoninus says that though *Dos* is "*in bonis mariti, mulieris tamen est*" (D. 23. 3. 75). This language is remarkable. "*Rem suam esse*" is the regular form of assertion of full ownership in real actions. "*In bonis esse*" is the usual expression employed to describe rights not amounting to actual *dominium*, but giving practical ownership. The language of Tryphoninus thus makes the wife the *dominus*, and the husband something else. This exactly reverses the real legal state of things. In fact, the wife has, at least in the classical law, nothing more than a *ius in personam*, while the husband is unquestionably the *dominus*, having indeed, subject of course to a duty of accounting,

that most testing of all rights, the power of manumitting a slave, so as to make him a *civis*. The general rules of the institution make the fiduciary position of the husband clear enough. As to moveables, however, there are no rights against third persons: the husband alone is liable. But as to land, by the combined effect of the *lex Iulia* and later legislation, any alienation by the husband was null and void, and the property might be vindicated from the buyer. But there is no question of a trust binding on some and not on all: it is simply a restriction on alienation, similar in nature and purpose to the old rule under *De Donis*. Though the buyer has acquired the legal estate for value and without notice, the wife will be entitled to treat the alienation as a nullity.

The case of *Fideicommissum* provides us with something very like a trust. It may be the origin of our English notion, though, as Spence remarks (*Equit. Jurisd.* 1. 436), the English institution shows a great advance on that of Roman Law (see however, Maitland, *Collected Papers*, 3. 337). Indeed, the characteristic which alone justifies the introduction of *fideicommissa* here, and will be noted shortly, is so obscurely evidenced in the texts that it was in all probability not present to the minds of those who founded the trust. What they had in mind was, it seems, the obligation on the Feoffee: duties in third persons are a later idea. The characteristic of a *Fideicommissum* is that the property is left to X on the terms that immediately or at some future time, he is to hand it over to Y. In one

sense, this is a mere matter of obligation. The fiduciary and his heirs will be bound just as they are by a legacy *per damnationem*. A sale to a third person will make him owner. But that does not state the whole matter : we shall have to recur to it later in dealing with restrictions on alienation. Here it is enough to say that, if texts are to be trusted, *fideicommissa* provide us with a case in which a sale, *prima facie* valid, can be set aside as against one who bought with notice of the trust.

Spence (*loc. cit.*) notes some attempts to create trusts *inter vivos* (D. 50. 1. 15. 2; D. 50. 5. 1. 2). These were, however, for unlawful purposes, and were declared to involve forfeiture. There is no sign of effective gifts of this sort, and so far as they did exist, these things were not trusts in our sense. They could have been no more than what the *Fiducia* of earlier law was: mere matter of contract between the two parties. There is no question of any effect on third parties.[1]

[1] The absence of the Trust in countries governed by laws descended from the Roman Law has given rise to inconveniences. Thus, the University of Louvain has not been endowed with juristic personality, and thus can neither hold property nor make contracts. Dom Grégoire Fournier of Louvain has been kind enough to tell me that any endowments intended for the University of Louvain are of necessity vested in friendly persons who are under no legal obligation at all, but could if they thought fit apply the funds to their own purposes, without fear of any proceedings either civil or criminal. He tells me also that it is now proposed to confer Personality on the University, a proposal to which effect may have been given before these pages are printed.

CHAPTER II

EQUITABLE REMEDIES

IMPORTANT as is the part played by the jurists in the development of the law, the introduction of new forms of remedy is not within their scope. They take a prominent share in the extension of existing remedies to new cases, but the actual introduction of new types of legal proceeding is necessarily the work of the legislature or the magistrate. Of those of praetorian origin, which alone we shall have to deal with, some are based on the *Imperium*, others on the *jurisdictio*. But this distinction may here be disregarded, since, besides being loosely handled in the texts themselves (Mommsen, *Staatsrecht*, I. 187) its main importance is in relation to the distinction between decrees made by the Praetor himself and reference to the "*unus iudex*," which is not for our present purpose very significant. It is the less necessary to attempt any classification, since the matters to be dealt with here are very few, and therefore no distinction will be drawn between those remedies which are merely ancillary, *e. g.* Discovery, and those which are or may be final adjustments, *e. g.* Injunctions.

I. *Missio in Possessionem.*—This procedure consists essentially in putting a plaintiff into actual possession either of property the subject of litigation, or of the whole estate of the other party, or of an inheritance to which he is entitled. It is applied in a wide range of matters (Girard, *Manuel*, 1046), in some cases as a means of compelling a party to give certain securities, *e. g.* in the case of *damnum infectum* (D. 39. 2. 7), and in the law of legacy (D. 36. 3. 5. 1), in some cases for the protection of contingent interests, *e. g. Ventris nomine* (D. 25. 5. 1), and in others as a step towards execution of judgment. The powers and obligations of the *Missus in possessionem* vary greatly in the different cases. Most of its applications have no parallel in our Equity, but the *missio in possessionem* which follows a judgment is in principle so like Sequestration as to suggest direct derivation, though, in fact, the institutions seem to be independent. In the Roman Law a decree of *missio in possessionem* would issue in favour of the plaintiff if the defendant failed to satisfy a judgment, or evaded service of process or failed to appear. The order covered the whole of his goods and was issued to the plaintiff. In the ordinary case, a *Magister bonorum* was appointed by the creditor and other creditors who might claim and the estate would eventually be sold (Gaius, III. 78, 79), the matter having become in fact a case of insolvency. But in some cases, apparently more frequent in early than in

later law, where for any reason immediate sale would operate unjustly, *e. g.* where the debtor was away on State service, the procedure was different. The creditors did not appoint a *magister*, but applied to the Praetor to appoint a *curator*, who was usually a creditor, whose duty it was to take care of the estate in the interest of the creditors. He had wide administrative powers, even of sale, but it does not appear that this procedure was used where the case was likely to become one of *Bonorum Venditio* (Girard, *Manuel*, 1040). The functions of such a *curator* are very similar to those of a Sequestrator. He too is an officer of court, and is appointed in much the same circumstances as is the curator. The right to seize property other than the actual subject matter of the suit was only gradually arrived at in our law, and neither this nor the right of sale exists where the sequestration is on mesne process.

II. *Discovery.*—Spence has called attention (*Eq. Jurisd.* 1. 678) to the analogy with discovery provided by the *actiones interrogatoriae* of the classical Roman law. But the interrogations in these actions, though they may be said to aim at the disclosure of facts material to the case of the person who asks them, deal only with fundamental points determining the *locus standi* of the parties.

They appear in very few cases. The Edict allows a creditor of a deceased to ask the defend-

ant if he is *heres* and for what part (D. 11. 1. 1). It allows a man damaged by a slave or animal to ask whether the defendant is the owner (D. 9. 4. 22. 4; 9. 4. 26. 3; 11. 1. 5, etc. The exact nature of the question here is disputed, Lenel, *Ed. P.* (2) 156), and in practice, though perhaps without authority in the Edict, one who was claiming land might ask the defendant if he was in possession of it or not, and an analogous question might be asked in a case of *Damnum infectum* (D. 11. 1. 10; *h.t.* 20. 1. Other cases, *h.t.* 9. 7, 11; Roby, *Roman Pr. Law*, ii. 399). But the Edict "*De Edendo*" provides a much more general rule (D. 2. 13; C. 2. 1). Its main provision is entirely in the interest of the defendant, and it requires the plaintiff to disclose to him all the documents on which he proposes to rely before the *iudex*. This is done out of court, and according to Lenel (*Ed. Perp.* (2) 60) before the issue of summons, *i. e.* before the *in ius vocatio*. It appears also, though it is not quite so clear, that the defendant might require the production of the plaintiff's accounts, even though the plaintiff was not going to put them in. There is in general no corresponding obligation on the defendant, even in the case in which he is relying on an *exceptio*, and thus is, so far, in the position of a plaintiff. But where the *Fiscus* is plaintiff the defendant must produce his accounts, and in any case the *iudex* has authority to order them to be produced, but this is in the course of the hearing. There is a

further Edict, due to the intimate way in which the money dealers of Rome were concerned with the actual dealings of their clients, under which *Argentarii* and *Nummularii* may be required to produce their accounts, even in litigation in which they are not concerned, with certain penalties for disobedience and safeguards against abuse (D. 2. 13. 4 *sqq.*).

III. *The Interdict.*—The Interdict is in point of form almost exactly like that powerful instrument of the Chancery, the Injunction, and even beyond points of form the resemblance is, up to a certain point, extremely close. There was, however, of course no such struggle between jurisdictions as that which has enlivened the history of the Injunction. The Praetor had, naturally, the power to stay proceedings which he had himself authorised, and any magistrate with a higher *imperium* could do so (D. 5. 1. 58). And there was a machinery for setting aside alienations of property, designed to transfer the jurisdiction to another court (Roby, *op. cit.*, ii. 277). This, however, rests on different notions altogether, and the Interdict plays little part in it. But, as is well known, Interdicts played a very important part in the protection not only of public interests, but also of private rights, though the absence in Rome of many modern forms of property, such as patents and copyrights, prevents their appearance in the field in which Injunctions are nowadays perhaps most

important. But, apart from that, their field is far narrower than that of the Injunction. There is no sign of an interdict to prevent defamation. They are not used to give a remedy for breach of contract, except indeed, so far as a possession which they protect may have originated in contract. They are all substantially for the protection of property, in a wide sense, or of public rights.

Within these limits, however, they present a close similarity. Thus all the possessory interdicts resemble interlocutory injunctions in that they presuppose an outstanding question of right, and, like them, they are often in actual fact, allowed to be decisive of the whole question. Unlike injunctions, but like the Habeas Corpus under the old practice, they are issued without inquiry, on an *ex parte* statement, and it is only on the actual hearing that the question is raised whether they ought to have been issued, that is to say, whether the act forbidden was in the circumstances unlawful under the Edict, or the act commanded obligatory. On the other hand many of the interdicts protective of public rights, or connected with the enjoyment of easements are final. They, too, are issued without inquiry, but further proceedings under them will be effective only if a public or proprietary right is fully proved. Possession as protected by the possessory interdicts is a purely provisional right,which may be destroyed by bringing the appropriate proprietary action, but the

decision on an interdict as to, *e. g.* a public way, is decisive of the right. The interlocutory character of the possessory interdicts is therefore only apparent: it is not the interdict which is provisional, but the possessory right which it protects. Again, Restitutory interdicts, ending with the word "*Restituas*" are essentially Mandatory Injunctions. They are fairly numerous, and at first sight it might seem that this somewhat drastic remedy was given with undue liberality, or at least, more freely than with us. But that is not the case. Though numerous, they cover a narrow field. The great majority of them are for restoration of property, where it is obviously the right remedy, and involves no injustice, or of interference with public and private rights of way, or the like, in which damages would clearly not be an adequate remedy. The other cases are all so safeguarded as to do no injustice. Thus the interdict "*Quod vi aut clam*" is for actual removal of work executed on the plaintiff's land, or on the defendant's land in which the plaintiff is interested, *e. g.*, to the detriment of his easement of light. But it is available only if the act was done by force, which in effect means in defiance of prohibition, or with active concealment, or in such wise as to show that the doer knew that his right to do it was disputed (D. 43. 24. *passim*). So, too, in the analogous proceeding of "*Operis novi nuntiatio*," if work on any land was persisted in after express formal notice, on the land, of legal

objection to it, and before the legal dispute initiated by this notice had been determined, there was an interdict for destruction of the work done (D. 39. 1. 20). Similarly the so-called *Interdictum Fraudatorium*, for setting aside acts of any kind done in fraud of creditors was restitutory, and therefore mandatory, but it lay in general only against persons who were privy to the fraud (D. 42. 8. 10. *pr.*).

But, close though the resemblance of interdicts to injunctions is, up to the present point, the similarity disappears altogether when we come to the consideration of the way in which these orders were enforced. Disobedience to the Chancellor's injunction was a contempt, and, apart from the system of sequestrations which gradually developed, there was a power, very freely exercised, of committing the offender to prison, until his contempt was purged. In addition to this, the Court claimed the right of imposing fines. The state of things in the classical Roman Law was very different from this. Nothing is more remarkable than the contrast between the strenuous language of the interdict and the comparatively feeble way in which it was enforced. The words of the interdict are imperative and uncompromising: "*Vim fieri veto*," "*Exhibeas*," "*Restituas*." The proceedings under it resolved themselves into the trial of an ordinary formulary action, and under that system the condemnation was always for a sum of money. It was, however, always possible

to put a certain indirect pressure on the defendant. All the mandatory orders, *i. e.* the Exhibitory and Restitutory interdicts, could be tried by *formula arbitraria.* This however was at the discretion of the defendant, and he would choose it to avoid the money risk involved in the *Sponsiones* which constituted a part of the proceedings in the alternative mode of trial, not, we may be sure, in order to provide a better remedy against himself. Indeed it is obvious that it does not give any better remedy. We can see from the language of Gaius (G. IV. 165, 166, the text is imperfect, but so much is clear), that in Prohibitory interdicts also the ultimate *formula* for trial would include a *clausula arbitraria* in appropriate cases. The question remains: how far does this clause, which authorises the *iudex* to order actual restitution if he thinks fit, instead of a money payment, put pressure on the defendant? If the *iudex* elects to make a restitution order, what will happen if the defendant disobeys it? It is now universally agreed that the law of the time of Gaius provided no means of direct compulsion. There was, however, a means by which the defendant could be made to pay for his contumacy. The money *condemnatio*, in the case in which the defendant has refused to obey an order for restitution, is to be fixed at the sum declared by the plaintiff, after he has taken an oath that he will fix it fairly. In effect the amount is left to his conscience, for Paul tells us that the courts will

not readily allow proceedings for perjury against one who has sworn under these circumstances (D. 12. 3. 11). It is clear on many texts that the amount so arrived at operated as a penalty (D. 12. 3. 1; D. 35. 2. 60. 1. Other texts cited, Accarias, *Précis de Dr. Rom.* ii. 1255). The only trace of a practical limit seems to be that in later law, though probably not in the time of Gaius, the *iudex* might impose a *Taxatio*, *i. e.* fix a limit which the plaintiff's estimate might not exceed. It is, however, obvious that the gain to the wrong-doer might in some cases be so much greater than the loss to the plaintiff, however audacious his estimate, that this machinery would not be deterrent. There is, however, an isolated text which tells us of a further possibility. We can gather from it (D. 43. 29. 3. 13), that where the wrong continued, the *iudex* might in his discretion allow a new interdict, so that the defendant might be in effect repeatedly penalised so long as the wrong continued, a process somewhat like the repeated fining inflicted by the Court of Chancery in the case of Awbrey *v.* George (cited, Ashburner, *Equity*, 40). But, apart from the fact that in Rome, as with us, this was plainly a very exceptional proceeding, it would not be available in a case in which the wrong was done once for all, for instance, by building or destroying in defiance of an *Operis Novi Nuntiatio.* Such an order was discharged on satisfaction, and no new order would be of any utility, since there would be no new disobedience to it.

In the later law, under the system of *Cognitiones Extraordinariae*, there is no doubt that the orders of the court would be directly enforced by its officers. To this we shall recur in dealing with Specific performance. Here it is enough to say that it was impossible to enforce in this way an order to rebuild or to pull down, or the like: the old indirect methods were the only possible ones in the absence of any power of coercion of the person such as that of commitment exercised by the Chancery. It was only in connection with the production or delivery of things in dispute that the Roman methods, even of the later law, could have been very effective.[1]

IV. *Restitutio in integrum.*—This is the technical name of a power exercised by the Praetor, of re-establishing the legal *status quo ante*, *i.e.* in effect, of placing an applicant in the position in which he would have been if a certain transaction had not been carried out, or an event destructive of right had not occurred. The grounds on which it was allowed are not numerous; the principal being: Absence, from a variety of causes, while the period of prescription is running; Mistake, Fraud; Duress; Minority, where actual injury is shown, and some others which have no parallel in our law. There was a general

[1] It is possible that under the little-known *Interdicta Secundaria* (G. iv. 170) the Praetor's *coercitio* may have come into play. Refusal to take the procedural step ordered by the Praetor would be disobedience to him. Refusal to restore under the *arbitrium* was disobedience only to the *iudex*.

power to grant *restitutio* for cause shown, but this is stated at the end of a list of causes of Absence which has resulted in loss of a right by lapse of time, and it is generally held on other evidence in the texts, that the rule was applicable only to cases *eiusdem generis*. Minority and Absence play a more important part than they do in English equity. On the other hand, error is much less prominent, for the cases of error to which the Edict applies are all cases of error in procedure. Again, there is no such head as Undue influence. This is no doubt in part due to the fact that in precisely those cases in which undue influence was most to be feared, those of the father and the *patronus*, the Roman Law was very chary of allowing any remedy which tended to discredit them (C. 2. 42. 2). And, apart from this, the case may have been covered by *Dolus*, as we are told *Metus* or Duress was, though that also appears independently. But there do not seem to be any texts unequivocally dealing with the matter, though it appears as a makeweight in some case of claim by a minor (C. 2. 21. 7; C. 2. 33; D. 4. 4. 3. 5, 6; Cp. D. 4. 2. 21. *pr.*). It may also be noted that the treatment of the case of a minor who pretends to be of full age is not quite as in Equity. A minor's contract was in general valid, but in certain circumstances he could get relief. That is to say his contract bound him unless he took certain steps to set it aside. If he had pretended to be over age he lost this right. In English Law

his contract is in general, *exceptis excipiendis*, either absolutely void, or unenforceable against him, but as Sir Frederick Pollock puts it (*Contract*, p. 55), " one who has represented himself of full age is . . . liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it."

Mistake is stated by Paul in general terms as a ground of *Restitutio in integrum*, (P. 1. 7. 2.; D. 4. 1. 2), but there is no general edict giving relief in case of mistake. There were special Edicts dealing with specific cases, not an edict for each case mentioned in the texts, but, as Lenel shows, (*Ed. Perp.* 2. 119) certainly more than one. All the cases however are of one type. They are cases in which there has been an error in procedure before the Praetor, which has led to loss of the action, which the Praetor restores; they have thus little importance for the general law. In the ordinary law of contract, error, so far as it is material, is a ground of nullity, raised at the actual hearing before the *iudex*, and the rule, which is very much easier to state than it can possibly have been to apply, is that it avoids the contract if it is fundamental error, *error in substantia*, but is absolutely indifferent if it is *error accidentalis*, error in the *accidentia* of the contract. This at least is how it is handled in *bonae fidei* contracts. In *stricti iuris* contracts and in other forms of transaction the rule is not easily to be made out: indeed it is the subject of a great mass of controversy, into which

it would be quite foreign to the present purpose to enter.

The treatment of mistake of expression where the intent is clear is also rather difficult to make out. So far as wills are concerned, it is plain that errors of expression may be corrected by outside evidence (D. 30. 4; 30. 15. *pr.*; 32. 39) and the treatment of accidental or intentional erasures, and of ambiguities apart from catastrophic intervention of the Emperor (see above, p. 14), appears to be, as is natural, the origin of our own. (See, *e.g.* D. 28. 5. 2; *h.t.* 9; D. 34. 8. 2; 35. 1. 33; 37. 2. 1.) In relation to contract there was no specially formal document like a deed. Nor was there any rule that a written agreement cannot be altered by parol evidence. Apart from certain well-known statutory rules, affecting stipulations (Inst. III. 19. 12, 17), writings were of the same weight as other evidence (C. 4. 21. 15). The real question is: what was actually agreed on, and therefore amendment was always possible or rather unnecessary. This is laid down over and over again (D. 44. 4. 4. 3; 45. 1. 32.; C. 4. 2. 6; and especially C. 4. 22. *passim*; D. 22. 3. 9; and D. 22. 4. *passim*). All these points are discussed in the hearing before the *iudex*. There is, therefore, no need for any special praetorian powers of amendment, such as are exercised by the Chancery Division. It may be worth while to observe, by way of contrast with the next case to be considered, that if, apart from compromise, an agreement had been carried out

which was void for mistake, or under a mistake as to its correct interpretation, what had been done was an *indebitum* and the matter could be put right by the ordinary machinery (*e. g. condictio indebiti*), without any need to appeal to the special powers of the Praetor (D. 12. 6. 22, 27).

Metus and *Dolus*, Duress and Fraud, may be taken together for the present purpose, for which also it is not necessary to attempt to define either conception. In general, transactions tainted by duress or fraud were valid at civil law. This is, indeed, not the case in *bona fide negotia*, the very nature of which requires good faith. But apart from them it was only the intervention of the Praetor which gave any relief. There was no civil law action of deceit. The Praetor's scheme of remedies was, however, very complete. He gave an *actio metus* and an *actio doli*, differing somewhat in their incidence and effects, but not in ways material to our purpose. He gave an *exceptio metus* and an *exceptio doli*, which were available as a complete defence, if action was brought on the transaction impeached. The *actio doli* was given only *causa cognita*, *i. e.* the Praetor satisfied himself that the fraud alleged was a material one (see D. 4. 3. 7. 10), but, apart from this, these various remedies were matter for the *iudicium :* the *iudex* inquired into the alleged fraud or duress and allowed the action or plea, or refused it, accordingly. But the Praetor intervened in yet another way. He gave *restitutio in integrum* for fraud or duress. Here the Praetor

himself inquired into the allegations, and if he held them well founded, issued a *decretum* of *restitutio*, the effect of which was to annul the transaction impeached and with it all rights and liabilities that had resulted from it. It might seem that the *actio* and the *exceptio* made a complete scheme, but there are numerous advantages in restitution. Thus, if the transaction were an alienation the rescission would give the injured party a real action, which might be a much better remedy than a personal action against a possibly insolvent defendant. And where the act done under duress had been entry on an inheritance, the rescission would annul once for all all the liabilities incurred in connection with the estate (D. 4. 2. 21. 5. Full discussion, Girard, *Manuel*, 416; Roby, *Rom. Pr. L.* ii., 226, 262; Accarias, *Précis*, § 844).

In this, and in all cases of *Restitutio in integrum*, the Praetor's decision takes the form of a *Decretum*. The effect of this is to make the impeached transaction a nullity at praetorian law. But the Praetor's *decretum* does not set aside the civil law. If, for instance, the transaction had been an alienation induced by fraud, the litigant who has obtained the decree cannot bring a *vindicatio* for the thing. The thing is now *in bonis eius*, but not his *ex iure Quiritium*: he has only an equitable title. He must therefore bring a praetorian action, the nature of which will vary with the facts. In the case proposed it will no doubt be an *actio fictitia*, in which the *iudex* will be directed to proceed as if

the impeached transaction had not occurred. The case will be tried by an ordinary *iudex* in the ordinary way, but he will dismiss from the case the transaction affected by the *decretum*.

It should be added that like other judicial proceedings, the *restitutio in integrum* operates only *inter partes*. No one is barred by it, except those who were parties to it, or persons claiming under them.

V. *Denegatio actionis*. The refusal of a *Formula* to an applicant may fairly be cited as a special praetorian remedy, because in many cases it operates to deprive of its legal effect a transaction which has been gone through, so that it acts as a *restitutio in integrum*, though it is not so called. It is closely analogous to the power of the Chancellor to interfere in legal proceedings and prevent the plaintiff from enforcing his legal rights. There is, however, no question of a conflict between jurisdictions: the Praetor is seised of the matter from the beginning, and thus his intervention is usually at a very early stage, *i. e.* when the plaintiff is asking for a *formula*. Texts on the matter are numerous, but many of them have no relation to the present point. Sometimes the Praetor's *denegatio* merely means that the action is barred on legal grounds. (See for instance D. 12. 2. 9. *pr.*; 29. 6. 1; 38. 13. 1; 45. 1. 27.) In other cases, where the action is of praetorian creation, the *denegatio* merely means that the conditions under which the action is given do not exist (see, *e. g.* D. 11. 6. 3.

pr.; 37. 6. 1. 13; 47. 10. 15. 44). In other cases it is a means of enforcing praetorian defences as to which it might equally well have been provided that they should be raised in the *iudicium*. Thus, if a *heres* allows the praetorian *spatium deliberandi* to expire, "*actiones ei denegantur*" (D. 29. 2. 69. *pr.*). Where a *suus heres* has taken advantage of the *ius abstinendi*, the Praetor "*denegat ei actiones*" (D. 29. 2. 99). So where a debtor's tender is refused (D. 46. 3. 30). But there are other cases in which the Praetor's action looks more like equitable relief. The *formula* is refused, although there is a complete legal right, but the circumstances make it undesirable to allow the action. Thus if the Praetor thinks the case will prejudice another litigation of higher importance he will refuse the *formula*, though in some cases the same point may be raised by *exceptio* in the *formula* (see Girard, *Manuel*, 1001). The Praetor refuses an action against a *Legatus* on duty abroad, lest his performance of his duties be interfered with (D. 5. 1. 24. 2; 13. 5. 5. 1). A minor having borrowed money, has wasted it : an action is refused to the creditor, which gives a result somewhat like *Restitutio in integrum*, in connection with which it is mentioned, but even more effective (D. 4. 4. 27. 1). Robbery and damage are committed in a gaming house : the Praetor refuses all actions, even *vindicatio* (D. 11. 5. 1. 3), and there are many other cases. It may be noted, without illustration, that sometimes where he has granted a *formula*, he interferes at a later stage and refuses

process in execution (*e. g.* D. 9. 4. 14. *pr.*; 42. 1. 4. *pr.*).

It is clear from the cases cited that the method of *denegatio* is used in general only where the facts are fairly obvious. It is also clear that this method rests on the *imperium* of the magistrate, and that at least in some of the cases there was no express authorisation in the Edict.

CHAPTER III

EQUITABLE RIGHTS

In the following pages it will not be possible to group the rights discussed in a very logical way. So far as possible, the arrangement will be to deal first with those rights which have no direct connection with *iura in rem*—with rights of property.

I. *Specific Performance.*—We have seen that in the classical law every judgment was for money, and it is plain that specific performance of contract can form no part of that scheme. It is true that one does occasionally come upon classical texts which speak a different language. Thus Paul, in his *Sententiae* (P. 2. 12. 12), says that in the *actio depositi* there can be no set-off, but "*res ipsa reddenda est.*" This, however, only states the duty, not the terms in which the judgment will express it. We have seen that the *clausula arbitraria* provides a sort of escape from this, but we have seen also that this is indirect and uncertain. Moreover, while it seems to exclude, as our Equity rule does, specific performance of contracts to serve, or to build (though to this last exclusion, Equity admits an exception, Wolverhampton Corporation *v.* Emmons, 1901, 1.

Q.B. 515), or the like, which cannot be readily supervised by the court (D. 42. 1. 13. 1), there is also little or no sign of it in ordinary contractual actions. There does not appear to be a trace of it in the numerous and lengthy titles dealing with Sale and Hire. It is true that in the *formula* for the action on *Depositum* given by Gaius (G. 4. 47), the words "*nisi restituat*" occur. They may be due to a copyist, but it has been pointed out that there is a text in the Digest in which Ulpian attributes to Neratius the view that there might be a *clausula arbitraria* in this action (D. 16. 3. 1. 21). It is difficult to suppose such a specific attribution to be a wanton interpolation. But we have already seen that the action on deposit was one in which the duty to return was emphasised, so that this does not take us very far. It should also be pointed out that there is a text in Paul's *Sententiae* (P. 1. 13. 4) to the effect that if a vendor will not deliver the property, he can be compelled (*cogi*) to deliver or mancipate. In view of the very explicit statement of Gaius, that the classical law contemplated a *condemnatio* for nothing but money damages under any circumstances (G. 4. 48), this must not be taken as meaning that, even in the classical law, there might be a *condemnatio ad ipsam rem.* But it may be an allusion to the indirect pressure of the *clausula arbitraria,* and thus be evidence that there might be a *clausula arbitraria* in the *actio ex empto.* If so it is unique. It is in a short title containing a

number of heterogeneous matters, and it has been thought that part of the hypothesis has dropped out, and that the text originally had no reference at all to ordinary obligation on contract. Or it may be read (Girard, *Manuel*, 551) as meaning no more than that the obligation of the vendor is to transfer by the appropriate method, a rule as to which we have already observed that its existence is controverted.

Assuming that the classical law admitted only of money damages, there arises at once a serious difficulty. What is to be done in cases in which damages are not only an inadequate remedy, but are actually inconceivable? Illustrations readily present themselves. Ulpian quotes Pomponius as contemplating the possibility of a father vindicating his son from a detainer, with a slight alteration in the "*intentio*" of the *formula*, to indicate that the right he is claiming is not exactly *dominium*. He suggests, as a more usual alternative, an interdict, which is presumably the interdict *De liberis exhibendis*, or *Quem liberum*, either of which would seem to meet the case (D. 6. 1. 1. 2; 43. 29. 1. *pr.*; 43. 30. 1. *pr.*). But the difficulty is the same in all three remedies: if the holder refuses to obey the order of restitution, how is the father to value his son? The interdict might be repeated till it was obeyed (D. 43. 29. 3. 13), and the detention would at least at this stage be a crime (D. 48. 15. 6. 2), so that release would be obtained by other machinery. For the outrage there would

also be an *actio iniuriarum*. A woman has put herself into *manus*, *fiduciae causa*, *e.g.*, to change her tutor, and the person with whom she made *coemptio* refuses to remancipate her. Here we are told by Gaius that she can "*cogere*" him to do so, the *manus* being purely formal (G. 1. 137a). The text is defective and does not tell us how she compels him. Probably it was a case of direct intervention of the magistrate, by means of his power of *coercitio*. This power (see Mommsen, *Strafrecht*, 35 *sqq.*) was available for disobedience to a magistrate's order, and can readily be conceived of in this case, which is wholly outside the field of ordinary litigation, but it would not be available in the case of disobedience to the *arbitrium*, for this is an order of the *iudex*, not of the magistrate, who has nothing more to do with the matter after the issue of the formula.[1] Again, a

[1] My friend, Mr. J. P. Bate, has kindly pointed out to me a curious instance of the use of this notion of collusive marriage under another legal system. In the *Report of the International Law Association* (1910, at pp. 259, 260), occurs the following passage—"As to methods of divorce one of the most remarkable is that existing among Mussulmans in Egypt, where the husband may divorce his wife by repudiating her. . . . This repudiation is either revocable, or irrevocable, and the latter repudiation may be perfect and definitive if pronounced three times; and curiously enough, in certain circumstances where the husband has repudiated his wife twice he cannot revoke the repudiation, and take his wife back again, until his wife has married some one else, and has been 'repudiated' by this kind of interlocutory husband. We are informed that amongst certain Mussulmans a custom has sprung up of certain men assuming the rôle of temporary husband for a consideration, to enable the husband to take his wife back again. And instances have been known where

slave is left to X with a *fideicommissum* of liberty, and the *heres* refuses to hand him over, but is willing to pay his value as damages. Here the classical law seems to have had no remedy but the indirect pressure of the *arbitrium*, the really injured man, the slave, having no redress. As we shall see shortly the later law dealt more straightly with the matter. A slave is left to X with a *fideicommissum* of freedom, and X, having received him, refuses to free him. There can be no question of damages or even of an action. There seems, indeed, to have been no remedy at all, until A.D. 103, when it was provided (*Sc. Rubrianum*) that the Praetor might cite the fiduciary before him, and, after inquiry, himself declare the slave free (D. 40. 5. 26. 7). About half a century later, the same rule was applied to a case which looks more like contract. Where a slave was bought by a third person with money provided on behalf of the slave, and the purpose of the transaction was declared to be that he should be freed, if the buyer neglected to manumit him, the Praetor would order him to do so, and on disobedience, would himself declare the man free. This is under a rescript of M. Aurelius and Verus (D. 40. 1. 4. *pr.*; 5. *pr.*). An ordinary action might have been brought in such a case, but damages to the vendor

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this provisional husband was so well satisfied with the lady that he refused to accommodate the previous husband by repudiating her so as to enable him to take her back again." See also pp. 391–392 of the Report.

would have been of no benefit to the slave, who was the really injured party. A little later M. Aurelius provided also that where a slave was transferred to a third party to be freed, he should become free automatically (D. 40. 1. 20. *pr.*).

It is easy to see in these rules analogies with the attitude and methods of the Court of Chancery, but their greatest significance is in the evidence they supply of the difficulty the law felt in providing for specific satisfaction. It is obtainable only in those cases where it needs must be if the transaction is to be anything more than a mere farce, and, in general, there only by the intervention of the supreme legislature. Sir Edward Fry's sweeping statement that Roman Law had no such institution as Specific performance is plainly justified for the classical law (Fry, *Specif. Perf.*, p. 4).

But the state of things is very different in the later law. Under the system of *cognitio extraordinaria*, as then in operation, the judge has absolute power to condemn either for damages or for the actual fulfilment of the obligation, and the order for "*restitutio*," which means, not necessarily restoration, but handing over or putting right, could be enforced by seizure of pledges, a form of *sequestratio*, by actual seizure and delivery by officers of court, and in other ways. Thus, in a case which we have already mentioned, where a *heres* refused to hand over a slave who had been left to X with a fideicommissary gift of liberty, and the judge ordered damages, Justinian wonders

how the judge can have been so stupid as to do this instead of ordering actual delivery (Inst. 4. 6. 32; C. 7. 4. 17; D. 43. 4. 3. *pr.*, 1, *etc.*). But certain difficulties still remain. Thus it is clear that *actiones arbitrariae* still existed, and, in view of the wide power of *condemnatio*, it is not easy to see what purpose they served. It is suggested by Girard (*Manuel*, 1070) that it was to provide what was, as we have seen, in effect a penalty, in the event of simple contumacy on the part of the defendant. It is clear from the principal text, which is, however, mostly the work of Justinian's compilers, that the *officiales* would carry the direction under the *arbitrium* into effect if necessary (D. 6. 1. 68). Another point of difficulty is that in the Code (C. 7. 45. 14) Justinian speaks of specific enforcement of obligations to render some service, but it is also clear that in such cases the usual course was a money condemnation, as it would be with us (D. 42. 1. 13. 1). A still more noticeable point is that the new conception has not influenced the language of the texts dealing with sale, even where justice calls for a better remedy (*e. g.* D. 19. 1. 6. 2; *h. t.* 11. 9; *h. t.* 21. 4. *etc.*). It must not be inferred, however, that in Rome, as with us, specific performance was an exceptional remedy to be given only where damages would not be an adequate remedy. Except for the negative evidence afforded by texts such as those last cited, there is nothing to show that specific performance was in any way in an

ancillary position. The judgment to be given was the one most convenient in the given case.

II. *Subrogation.*—This is a somewhat untractable subject, since it is very difficult to determine on what principle the modern rules actually rest. In our law it does not appear to be one of the most ancient of equitable notions. It is at least highly probable that both the conception and the name are borrowed from French Law, in which the idea is present from a very early date, and has been somewhat prominent since the enactment of the Civil Code, which provides for "subrogation légale" in four cases (*Code Civ.*, art. 1251). The French writers who discuss the topic seem to be agreed that the institution is essentially Roman. Both the name and the thing, they say, are borrowed from Roman institutions. The odd part of the matter is that, so far as can be seen, the name and the thing had little connection with each other in the Roman Law. *Subrogatio* is a well-known term of constitutional law, signifying the choice of an official to replace, or perhaps sometimes to act as colleague with, another. It is also employed, by Ulpian (*Reg.* 1. 3), to denote the supplementing of one enactment by another. It is not until the time of Justinian that it certainly appears in private law, and even then it is not in our sense. In an enactment in the Code, Justinian says (C. 6. 23. 28. 4), dealing with testators who cannot for certain reasons get all the witnesses present together, that those who come later can

be "subrogated," being formally notified as to what has been done in their absence. Another text, credited to Paul, but, so far as these words are concerned, in all probability due to Tribonian (D. 27. 1. 31. *pr.*), is still somewhat remote from the modern sense. A man who is burdened with three guardianships, and is appointed by the magistrate to a fourth, is not bound to execute it. The three are an excuse. But the appointment is not a nullity. If one of the first three children dies, the fourth guardianship at once becomes operative: the text remarks that it is automatically subrogated. This seems to be as near as the Roman Law gets to our use of the term.

As to the ancestry of the principle itself, there is no less obscurity, due to the extreme difficulty of determining what, in fact, is the principle itself. It is observed by Mr. Whittaker in the new edition of *White and Tudor* (i. 152), that "it is difficult to deduce from the authorities any principle which will at the same time account for all the cases in which subrogation has been granted and explain its denial in other cases." It is not defined in the Code Civil. In a modern French work, on another form of subrogation (J. Flach, *De la Subrogation Réelle*, 4), subrogation in our sense is defined in terms which may be paraphrased thus: "Subrogation is a juridical fiction by reason of which a debt extinguished by payment by a third party, or by the debtor with money provided by a third party, is regarded as still

existing for the benefit of the third party, to the extent of his payment. The third party is subrogated to the rights of the creditor." This of course merely tells us how the rule works: it gives us no hint of the means by which we are to determine whether or not it is to be applied in a given case. The writer does not even tell us what the "juridical fiction" is. However, commentators on the Code Civil carry the matter a little further. They tell us that it rests on an implied assignment. This view is derived from the eighteenth-century lawyers. Pothier (*Coutume d'Orléans*, 20. 5) says that subrogation is a fiction of law by which the creditor is regarded as ceding his rights and privileges to one from whom he receives his money. This is in turn rested on the Roman Law. To this we shall recur: here it is enough to say that the texts do not appear to give any warrant for this notion of Pothier's. The same idea appears to underlie most of the English cases: the right is made to rest on an implied assignment. The Court assumes to have been made an assignment to which the third party who has paid is equitably entitled.

This, however, does not help us much, since we are still left in the dark as to the circumstances under which the Court will think such an assignment ought to have been made. The truth is that in our law the doctrine is a growing one, not yet ripe for systematisation. The cases really rest on broad ideas of natural justice, as indeed,

has been expressly said in relation to the subrogation of sureties (Dering *v.* Earl of Winchelsea 1 Cox, at p. 321). Up to now it has been found convenient to use the conception of implied assignment, but it by no means follows that this is anything more than a temporary phase.

The elusive nature of the doctrine of Subrogation may be shown by another reference to the French view, which deduces it from the Roman law. Thus Girard observes (*Manuel*, 780), that the modern theory of subrogation springs from a fusion of the two Roman notions of *Beneficium Cedendarum actionum*, and *Successio in locum creditoris*. This is no doubt exact. But, in the first case, the cession of actions to a surety who has paid can be compelled, but is not feigned if the payer has not secured the actual *cessio*. And while Girard mentions four cases of *successio in locum* (pp. 781, 2), in one of these (D. 20. 4. 3. *pr.*; *h.t.* 12. 5), the case is of a creditor succeeding to his own right, and the text merely shows that he does not lose his priorities by making a substituted contract, even though another creditor has acquired a hypothec between the dates of the two agreements. In another (that of a buyer who has applied the money to payment of the first chargers), there is great room for doubt as to what the Roman Law really was. (The chief texts are D. 20. 4. 17, 19; C. 8. 18. 3.) The better view seems to be that the buyer was not protected against other chargers unless there had been an

express agreement that his money should be applied to payment of the first charger. This puts him in effect in the position of the third case, that of a person who lends money to pay off incumbrances, as to whom it is clear that he does not acquire the priorities unless he himself took a pledge at the time of the loan (D. 20. 3. 3; C. 8. 18. 1). But this is the same as the fourth case, that of a subsequent charger, who has the *ius offerendae pecuniae*, *i. e.* he steps into the shoes of a prior creditor by paying him off (C. 8. 17. 5; 8. 18. 2, 4; 8. 27. 5. 8; D. 20. 4. 19; 20. 5. 5). It seems to follow, then, that the only case in Roman Law in which there can be said to be strict subrogation is this of the second incumbrancer who pays off the first. This case is found in the customs of Orleans, and is there called Subrogation. The text, however, says nothing of implied cession of actions: the rule is called *Successio*. But it is noticeable that though a similar rule exists in our law (Conveyancing Act, 1881, § 15) it does not seem ever to have been treated as subrogation.

It should also be noted that in the cases in which one has advanced money to pay off a charge, or has bought the property on the terms that his money is to go to the creditor, though, under certain circumstances he is subrogated, there can be no question of an implied transfer of the creditor's rights. For, so far as appears there need have been no dealings at all between the first pledgee and this person who pays. The pledgee

need not, indeed, have known of his existence. This is obviously a stumbling-block for the theory of *cessio*. Accordingly it has been held, by Pothier (*loc. cit.*), amongst others, that he is not subrogated, but has acquired from the debtor a new hypothec of the rank of that which he has destroyed. But this explanation, rendered necessary by a faulty theory, does not agree with the language of the texts, which speak of the new creditor as succeeding to the rights of the old. Indeed, it is no explanation, for a new hypothec could not take precedence of other charges (D. 13. 7. 2; 20. 3. 3; 20. 4. 12. 8; C. 8. 18. 1. 3).

There is another case which can hardly be said to come within the notion of subrogation, but is so like it as to be worth mention. If legacies have been paid out of an estate, and, from some cause, the will proves invalid, so that the rights really vest in some person other than the payer of the debts, it is in strictness only the actual payer who can recover the money as an *indebitum*, but there were early imperial rescripts authorising the person in whom the *hereditas* really vested, and whose money therefore had been used, to bring *actiones utiles* for its recovery (D. 5. 2. 8. 16; 12. 6. 2. 1, 3). This is an intervention by the Emperor on equitable grounds, and there is no sign of any appeal to the notion of an implied transfer of actions.

The curious rule of Roman Law, that I could make myself your creditor by voluntarily paying

off your debt, gives a result something like subrogation, but essentially different. It is only where the debt so paid was absolutely unprivileged that it has any resemblance, for the third person acquires no priorities of the first creditor. But even in that case there is no subrogation. The payer acquires a new right of action under the principles of *Negotiorum gestio*, and subject to all restrictions, as to the purpose and effect of his intervention, to which that action is subject (D. 3. 5. 5. 5; *h.t.* 38).

There are several cases in which persons are liable in common, and one pays what ought ultimately to fall on another, but may have no right to fall back on that other. In such a case he is entitled to require a transfer of actions from the creditor, the claim being regarded as sold to him. Such cases are: that of one of joint holders of public land who pays the whole of the *tributum* (D. 50. 15. 5. *pr.*), that of a surety who pays the creditor, as against the debtor (D. 46. 1. 36), or of a co-surety who pays the whole debt, as against his co-sureties (D. 46. 1. 17, 39; C. 8.40.11), or one of *contutores* who pays the whole of what is due from all (D. 27. 3. 21; 46. 3. 76; C. 5. 58. 2). But in all these cases there is no subrogation by law. There is no right unless the actions are actually transferred, a step which he can exact as a condition of his payment. It is true that Savigny held that wherever transfer of actions could be compelled, the law would presume it,

so that the case would be one of true subrogation (Savigny, *Obligationenrecht*, § 23). But there is no hint of this in the texts, and some of those cited above directly negative the idea. As a general proposition it is now universally discredited, and the dominant view seems to be that there was in no case any such implied cession of actions. The corresponding right in English law, at least in case of surety, amounts to actual subrogation, and is declared to be based on natural justice, no attempt being made to deduce it from any defined principle.

It may be observed that Pothier himself is not satisfied with the notion of implied assignment, as a final basis. In default of a logical basis for an obviously desirable rule, he goes to the root of the matter for a moral basis, and rests the principle of subrogation on nothing less than the rule of the Gospel, that we should love our neighbour as ourselves. He states the rule, explicitly, but we are brought down somewhat painfully from this elevated plane, by the remarks which he appends. Fearing that the rule may not be quite intelligible as it stands, he adds the interpretation that it means that we ought to do whatever we can for him, without injuring ourselves, which is what the creditor does by transferring his right. We have fallen to the level of Mr. Lowten.

The somewhat haphazard way in which subrogation evolves is shown by one of these cases. A co-tutor has paid all when part was due from his colleague. He has not claimed cession of

actions. On the texts we have been discussing he has no right against his colleague. But, in some cases Pius, Severus and Caracalla gave him *utiles actiones* against the other tutor (D. 27. 3. 1. 13; C. 5. 58. 2). This is subrogation, but it can hardly be implied transfer, since Modestinus, in his *Responsa*, a book written, it seems, after the death of Caracalla (Fitting, *Alter der Schr. Röm. Juristen*, 130), tells us that actual transfer is needed (D. 46. 3. 76), and other texts in the same sense have already been cited. It must be uncertain whether the rule of the Emperors is to be generalised. Another sporadic case may be mentioned. A wants to borrow money. B doubting his solvency, but desiring to lend in effect to him, lends to his mother, and takes a pledge from her. She lends to A and takes a pledge (D. 16. 1. 29). It was held that the woman's pledge was void as it was in effect surety, and a woman's *intercessio* is void by the *Sc. Velleianum*. On the other hand, B could have no right in the pledge given by A to his mother. The result so far was a deadlock. The text, which is credited to Paul, but, so far as this part is concerned, is very likely due to Tribonian, as many of these *actiones utiles* are, says that the Praetor ought to give B the personal actions and the pledge given by A to his mother. This appears to be practically a kind of subrogation, the facts being construed as if B had advanced the money to the mother after she made the loan instead of before.

III. *Laches, Acquiescence, Estoppel.*—Expressions of these distinct but connected rules are plentiful in Roman Law. Indeed, as to mere laches, that system is more fertile than our own, since in principle there was no time limit to actions, at civil law. It is not until the fifth century that anything like a general statute of limitations appears. Even the Praetor, though he does introduce a limit of time for actions of his creation, confines that limit in general to actions of a penal character: for him, as for the civil law, actions aiming merely at ordinary damages are in general *perpetuae*. Accordingly we get many cases in which failure to take steps to secure performance of an obligation was taken into account as evidence of intention to waive the right. Thus, where there was a liability for interest, but it had never been claimed, it was held in many cases, on the facts, that the failure to sue was evidence of waiver, and that therefore past interest could not be recovered (D. 22. 1. 17. 1; 24. 1. 54; C. 4. 32. *passim*). We are repeatedly told that "*vigilantibus ius civile scriptum est*" (*e. g.* D. 42. 8. 24). As might be expected, however, it is in relation to purely equitable matters that the requirement of vigilance is most emphatically stated. Thus Ulpian tells us that creditors who are entitled to *bonorum separatio*, as against an insolvent *heres* must apply for it promptly. If they allow the *heres* to remain in possession, then, in the absence of proof of fraud on his part, they will soon be

barred (D. 42. 5. 31. 2). So too, he tells us in quaint language, quoting Neratius, that a man who is entitled to *Restitutio in integrum* on account of absence must apply within a short time, " not beyond the time," as Monro renders it, " he takes to hire a lodging, get his effects together, and look out for an advocate " (D. 4. 6. 15. 3). So Paul, dealing with the same matter, lays down a similar rule, and says, " *non negligentibus subvenitur, sed necessitate rerum impediti* " (D. 4. 6. 16). You must get your decree of restitution at once, though you may have a year in which to bring any resulting action. This appears to be a purely juristic construction, since the words of the edict say, so far as is known, nothing whatever about this promptitude.

Illustrations of estoppel by acquiescence are also common : cases in which a party is barred by reason of his having stood by and allowed another person to invade his right, under such circumstances as to lead that other person to think that he did not regard the act as an invasion of right. The rule developed fairly early. Thus Pomponius quotes Labeo as laying it down very clearly. There was an *actio aquae pluviae arcendae*, dating at least from the XII Tables, giving a remedy where a neighbour so altered the condition of his ground as to prevent the natural flow of water off your ground. But, says Labeo, if I make this alteration *patiente vicino*, he will not afterwards be able to bring this action against me (D. 39.

3. 19). Modestinus tells us of a case in which a father, under pretext of being unable to write, from some accident, gets his emancipated son to write a memorandum acknowledging that a certain house, which belongs in fact to the son, is pledged for a debt of the father. The son did not intend to bind his own interest, or as the text says "*consensum suum non accommodaverat.*" Modestinus says that his writing, with his own hand, an acknowledgment that his house is pledged, is evidence enough of consent, and the pledge binds him (D. 20. 1. 26. 1). A creditor who has a pledge is barred from enforcing it against a buyer if he has assented to the sale, but he is not estopped by standing by and saying nothing; for he has no reason to think the buyer will not take ordinary precautions to find out if there is a charge. He can rest on the fact that he knew his pledge was good against everybody. The sale is no interference with his right. But Marcian adds that if without actually expressing consent he witnesses a memorandum of the sale, the buyer is entitled to regard that as consent, and he is barred (D. 20. 6. 8. 15). This assent always operates rather as estoppel than as a waiver of his charge. For if he has assented to a sale and the agreement proves void, he is in no way barred as against the debtor (*h. t.* 4. 2). In another case land was pledged by A for a debt, and an agreement was made that the creditor should enjoy the land for a certain time and so cancel the debt. During this time the

creditor made his will and left to T "the land which I bought of A." A witnessed the will, but he was not estopped from proving that the creditor had only a pledge. No one could infer from his having witnessed the will that he knew the contents of it (D. 13. 7. 39). Another text dealing with pledge by estoppel contrasts two cases. A pledges B's property as his own. He afterwards acquires it. The pledge is binding against him. But if B has become A's *heres* there is no estoppel. No conduct of B's has misled the creditor, and for such an estoppel it is necessary, says Paul, "*ut ex suo mendacio arguatur.*" As *heres* he is responsible for misconduct only so far as he has profited by it, which in this case he has not (D. 13. 7. 41). In another case A allowed B, his natural son, to pledge for his debts a house common to both, not as a gift, but as one of a series of connected transactions. B died leaving an infant *heres*. Litigation arose between the *tutores* and A. The pledge was valid, as between them, against A (D. 17. 1. 38. *pr.*).

The effect of *Res iudicata*—estoppel of Judgment—is not specially equitable, but there is one aspect of the rule in Roman Law, which may be stated here. In general, judgment bars only the parties, those whom they represent, and their successors. But Macer, in a long and somewhat corrupt text (D. 42. 1. 63), gives it a wider operation in some cases. He cites three cases, the pledgee, the vendee, and the husband holding a *dos*, all of them apparently

contemplated as being in possession. In these cases, the text says that if they have notice that litigation as to the title to the property is going on with the pledgor, the vendor, and the wife or her father, respectively, and do not intervene, the *exceptio rei iudicatae* will be available against them. This seems to be purely on equitable grounds, based on the fact that they have notice and have also the power to intervene. For the text goes on to distinguish cases in which they have no such power, and elsewhere it is pointed out that they are not barred by judgment against him from whom they derive title, apart from notice, if their title was created before the judgment (D. 44. 1. 10.). The text of Macer goes on to give an illustration of another type. If A brings an action claiming from B a man who is in fact my *libertus*, and I act as representative for B in the suit, judgment in favour of A will be effective to bar me.

IV. *Constructive Notice.*—By the doctrine of constructive notice is here understood a rule that where notice of a fact saddles a man with a certain liability, he will in Equity be held in certain cases to have that notice if he has notice of certain circumstances or facts from which a reasonable man would either infer the fact in question, or at least feel the necessity of making some inquiry as to whether the fact existed or not. The absence of the trust in Roman Law excludes the chief field of the doctrine, and apart from this the doctrine did not go so far in Roman Law as in Equity. With

us it seemed at one time as if we were likely to be saddled with constructive notice of the whole scheme of created things, though of late, a halt has been called. The doctrine is not to be extended to moveables—a distinction which would seem almost irrational, if treated as a hard and fast line, but which Maitland found clearly delimiting the same doctrine in the Lombard law (*Collected Papers*, 3. 332).

The Roman Law had, however, applications of the idea which seem to date from early times. The tendency is shown by Servius, quoted by Venuleius, who discusses the question when work has been done *clam*, so as to entitle an aggrieved person to claim the interdict *Quod vi aut clam*. The point of the contention is this : work is done *vi aut clam* if it is concealed or done against prohibition. This is satisfied, say Servius and others, if the work was such that you ought to have known that it would be objected to, and did not inform the person affected. It is no answer to say that you did not know it would be objected to, if a reasonable man would have known, lest, says Servius, a fool be in a better position than a reasonable man (D. 43. 24. 3. 8, 4). The same idea recurs in the rule laid down a little later, but still early, by Sabinus, that a thing deposited by a slave may be returned to him, unless the holder knows, or ought to have known, on the facts, that the master did not wish it so returned (D. 16. 3. 11). The rule is brought out more clearly by

Africanus. A woman cannot be a surety, or lend money on behalf of others, and a creditor of hers on any contract is barred by the *Sc. Velleianum*, "*cum scit eam intervenire*" (D. 16. 1. 12). A man sold property to his wife at a very low price, the transaction being substantially a gift. The husband assigned his claim for the price to a creditor of his, by way of *delegatio*, *i. e.* substituted contract, the wife promising to pay the creditor. The sale, having been in effect a gift between husband and wife, was void (D. 24. 1. 5. 5), and thus her promise was merely undertaking a liability for the husband. The creditor supposed the sale to have been a normal transaction, and sued the wife on her promise. It was laid down by Africanus that he must fail. Absence of knowledge, he says, is not material on the facts, for where the husband was the creditor a careful man would have inquired whether it was a genuine transaction or not. In other words, the facts he knew were such as to put him on further inquiry (D. 16. 1. 17. *pr.*). A loan to a *filius familias* was irrecoverable if the lender knew that the borrower was in that position. Julian expresses this in the words "*qui sciret aut potuisset scire filium familias esse eum cui credebat*" (D. 14. 6. 19). Ulpian, on the same topic, says that if that defence is raised, it is no reply that the creditor thought him a paterfamilias, merely *vana simplicitate deceptus* (*h. t.* 3. *pr.*). Elsewhere in the title we are told that if one lends the money, and another makes a stipulation for its return,

notice to either is notice to both, a rule which Pernice puts down to Justinian (D. *h. t.* 7. 7).

V. *Pledge, Lien and Charge.*—This topic may conveniently be considered at the end of this chapter, since *pignus*, from the Roman point of view, can be considered as creating both *ius in rem* and *ius in personam.*

The ordinary common law pledge and lien, which are practically the same things as the pignus and *ius retentionis* of the Roman Law, do not here concern us, but the law of Hypothec in Rome offers interesting analogies with the English law of lien, as further developed in Equity. The whole law of Hypothec both tacit and express, being independent of actual possession, bears a very close affinity to the equitable rules as to liens and charges, but it is hardly worth while to illustrate these. Probably the most striking equitable development in the matter is the modern idea of a floating charge. This is a charge on all the property of the concern, present or future, subject to the right of the debtor to go on dealing with the property, even to the extent of disposing of it in the ordinary way of his business as if the charge did not exist. These rights may of course be restricted by agreement; they make the charge a burden on the assets for the time being, and assets alienated in the ordinary way of business are released from it. This equitable right is in practice applied almost entirely in a very narrow field, *i. e.* in the case of Limited Companies, but

in Roman Law, though not more commercially important, it was operative in a wider range of cases. A charge on after-acquired assets was a practically applied general institute of the law. Such a charge could be created between any persons for any debt (D. 20. 1. 1. *pr.*, 6, 15. *pr.*, 1; D. 20. 4. 11. 3). Such a lien might arise by operation of law, without express agreement, in the case of certain privileged creditors, *e. g.*, the *Fiscus* (D. 49. 14. 28; C. 4. 46. 1; C. 10. 1. 1; Fr. *de Iure Fisci*, 5). In most cases it differed from the equitable charge just mentioned in that there was nothing floating about it: it attached to assets as they accrued, in the same way as if they had been specially charged. But there was a juristic rule stated only, as it seems, by Scaevola, and therefore possibly of rather late origin, that if a man pledged his business this includes his stock-in-trade (*merx*) and that the pledge did not follow what was sold, but covered whatever was added (D. 20. 1. 34. *pr.*). This rule was thus exactly like our own. It appears, however, that this intention to include future acquisitions needed to be expressly stated in contractual general hypothecs, until Justinian, but it was laid down by him that such a term was to be understood in all such future conventions (C. 8. 16. 9. 1). As is remarked by the early commentators, in an *Additio* to the Gloss, this is treating the *merx* as a *universitas*, just as *grex* and *peculium* are so treated for certain purposes (D. 6. 1. 3. *pr.*; D. 31. 65. *pr.*), but it carries the

conception much further than do the texts referring to these.

The institution seems to have worked badly in France, since the Code Civil adopts a rule established during the Revolution, absolutely forbidding agreements for the hypothecation of future acquisitions (*Code Civil*, Art. 2129). The institution does not appear in the Bürgerliches Gesetzbuch nor anywhere in the Imperial German law.

Other modern refinements of the law of pledge find a place in the Roman Law. It recognises, for instance, the pledge of a debt, which can be made effective by notice to the debtor (C. 8. 16. 4) and in other ways (D. 20. 1. 20. See Windscheid, *Lehrbuch d. Pandekten*, § 239). It admits also of the pledge of a pledge, the sub-pledge of our law (D. 20. 1. 13. 2; C. 8. 23. 1. 2). Commentators are disagreed as to whether this last institution is to be regarded properly as a second pledge of the thing itself, under powers implied in the first pledge, the solution most in accordance with the language of the texts (*e. g.* D. 13. 7. 40. 2; 20. 1. 13. 2), or, inasmuch as a man can pledge only what he has, whether it is not in strictness a pledge of his right of pledge, *i. e.* of the advantages which proceed from it (see Windscheid, *loc. cit.*). The former seems on the whole the more probable view, the Roman conception of pledge being, as will be seen below, such that it is difficult for the jurists, so far as language goes, to treat it as itself the subject-matter of a right.

Those general hypothecs which were created by law seem to have operated in practice in Rome rather as preferential claims on insolvency than as ordinary pledges. They form part of a scheme of privileged debts, some of which were mere privileged claims having priority over other unsecured debts, while these we are considering had priority also over secured debts of unprivileged kinds, even earlier in date. No doubt the creditor with a general hypothec had the same right as any other hypothecary creditor, of taking possession, and in later classical law, of selling, in the absence of a contrary agreement, but the Sources show little sign of the exercise of this right in these cases, except where there is actual bankruptcy. The determination of the exact order of these privileged claims *inter se* is a matter of great difficulty.

The whole system of hypothec as opposed to pledge is alien to our common law, and is indeed a little difficult to explain in Roman Law, which adhered in general so strictly to the rule that transfer of what we nowadays call *ius in rem* needed transfer of physical possession. The truth is that, mere allusive expressions apart, Pledge was not regarded by the Romans as a *ius in rem* in the ordinary sense. It was not a *ius* in the sense in which Servitudes were *iura*. No doubt we are told that the action to recover a pledge is an *actio in rem* (D. 20. 1. 17; C. 8. 13. 18). But we are also told that a pledge is merely the right to take certain procedural steps ("nullum est

pignus, cuius persecutio denegatur " which differentiates it from usufruct, D. 9. 4. 27. *pr.*). It is not covered by the ordinarily accepted definitions of a *Res*, and it does not seem that any text exists which in fact calls pledge or hypothec a *res*. It is not like a Bill of Sale, which transfers ownership however much its operation may have been cut down by statute. On the other hand, an ordinary special hypothec corresponds closely to an equitable lien. But where it is created by express agreement there is nothing of the trust about it, so that there can be no question of its being defeated by sale to a buyer without notice. It is good against every one but a prior charger, subject in later law to the requirement of registration. Those arising by act of law are numerous, but though like equitable liens they do not depend on possession, they are in their range more akin to common law liens.

The old Roman mortgage by transfer of ownership with or without actual transfer of physical possession seems to have existed until the fifth century of our era, but it had long since been superseded in importance by the system of *pignus* in which, as we have seen, the ownership did not pass, and possession need not, at least in classical and later law. The change, though in appearance more fundamental, was in effect the same as that which the Court of Chancery introduced into English Law, by the creation of the Equity of Redemption. The Roman reform reduced the

creditor's right to no more than a mere security for the payment of a debt, and the equitable view of the position of mortgagee, who is owner at law, was long ago expressed in the same terms. "The mortgagee's right to the land is only as security for the money due" (Thornborough *v.* Baker, Freem. 143). So Justinian defines *pignus* as a transfer to the creditor for the better securing of his debt (*Inst.* 3. 14. 4). The further development of the two systems has followed much the same lines: each system having looked after the interests of the debtor to an extent which to some observers has seemed somewhat unfair to the creditor, and perhaps in the long run, disadvantageous to debtors too. It has been said that the mortgagee in possession is the most unenviable of creatures, so closely are his actions scrutinised. There was at least as great severity in Roman Law. Unless there was an agreement that he might take proceeds in lieu of interest, the creditor might not draw any benefit from the property, and any receipts from it were set off against the debt, so that if his debtor was solvent, or the security sufficient, he had no inducement to see that the land was used to advantage. Moreover, the creditor had not only to take the greatest care of the property, but he was liable if it was stolen from him, even, as it seems, though this is disputed, where it was stolen without any fault of his (D. 13. 7. 13. 1, 14), and he was bound to account for any fruits, not only which

he had received, but also which he might have received, if he had been careful (C. 4. 24. 3; 8. 24. 2). The creditor's power of sale, itself of very gradual growth, was hedged around with increasing statutory restrictions (Roby, *Rom. Priv. Law*, 2. 109; Moyle, *Inst. of Just., Exc.* II *fin.*). His right of absolute foreclosure as it may be called, *i. e.* the right to keep the thing as his own, was in the later empire almost legislated out of existence (C. 8. 33), as indeed it has in our own law, at least where the interests of a mortgagor of realty are concerned. Other points which have given trouble in our law appear also in the Roman Law. Once a mortgage always a mortgage: if the agreement is essentially for security, no collateral terms can destroy the debtor's right of redemption. Where a mortgagee put up a nominee to buy the thing for him, this was no sale, and the right to redeem still existed (P. *Sent.* 2. 13. 4. See also C. 8. 34. 1). And there was the same difficulty to be decided in each case on the facts, in determining whether the transaction was intended to create a security, or was essentially nothing more than a sale with special conditions (D. 18. 1. 81. *pr.*). The creditor has the power, under certain conditions, of selling the pledged property. What is his position if the title proves defective? We gather from Ulpian that this had been the subject both of dispute and of legislation. The rule laid down by Ulpian is that apart from fraud, which covers knowledge

of the defect, the creditor selling under his powers is not liable for any defect in title (D. 19. 1. 11. 16). This is a state of things somewhat similar to that under the Conveyancing Act, 1881, where the mortgagee sells as mortgagee, and not by direction of the mortgagor. Exception was taken to penal stipulations raising the rate of interest if the money was not punctually paid, but the rule laid down was that such a stipulation might be valid as to the interest accruing after the default but not for the earlier time (D. 22. 1. 17. *pr.*). The evasion which has satisfied our courts does not seem to have occurred to the Romans. As to the circumstances of the sale of the property by the creditor, the debtor is rather better treated than he is in our law. The creditor's position is somewhat more like that of the tenant for life selling under the Settled Land Act 1882. He must give notice to the debtor, and in selling must have regard to his interests, rules resulting naturally from the *bona fide* nature of the contract of *pignus*, under which the sale takes place (C. 8. 27. 4, 7; D. 13. 7. 22. 4). He must pay over any surplus, with interest, if he has used it, or failed to pay it on demand (D. 13. 7. 6. 1, 7), and as the sale was in his own interest, he is personally liable to the debtor for this surplus, and cannot therefore put him off by assigning his rights against the buyer (D. 13. 7. 42). Moreover, as the creditor was not the legal owner, the buyer is not absolutely secure. If the sale

was made when, *e.g.*, the money was not yet due, it is simply void, and in any case if the buyer was party to any circumstances of the sale unfair to the debtor, damages can be got from him if the creditor's estate is insufficient (C. 8. 29, *pass.*).

It may be said in conclusion that the rule: "redeem up, and foreclose down," is represented in Roman Law fairly closely by the rule that any incumbrancer may sell and thereby destroy all rights of a later incumbrancer, except in any surplus in the price, subject to certain statutory delays (C. 8. 18. 1, 3; D. 20. 4. 12. 7). A subsequent incumbrancer can prevent this only by redeeming the earlier (C. 8. 19. 3), and, conversely, he cannot himself take any step towards sale or foreclosure so long as there are prior incumbrancers unredeemed (D. 20. 5. 1, 3). The *ius offerendae pecuniae* has already been mentioned in another connection. By this means a later incumbrancer can take the place of one prior to him, but this will not improve the position of any earlier advance of his as against mesne incumbrancers: there is nothing like tacking.

CHAPTER IV

EQUITABLE RIGHTS (*continued*)

THE subjects dealt with in this chapter will be those connected especially with Settlements of Property.

VI. *Advancement, Hotchpot, etc.*—In this connection there are two or three rules which may conveniently be treated together, since their origin is in the same idea. The first and legally most important is the rule in the Statute of Distributions which lays it down that in the distribution of the personal property of a deceased intestate, two-thirds are to be divided amongst the children equally, if there is a widow. The statute adds that the share of any child is to be diminished by the amount of any "advancement," *i. e.* of any gift made to him *inter vivos*, by way of an advance of part of the sum to which he will be entitled under the distribution. An analogous rule has been applied to the widow, as to her third, by the Courts, though the Statute does not seem to suggest this. It has been made clear by successive decisions that in order to have this effect, the gift must have been intended to be such an advance, and thus the rule will not

apply to maintenance money, or to expenses incurred for the purpose of education, or for apprenticeship. It is also clear that it does not apply to advancement by a mother. It is also well known that the rules of distribution are descended from the Roman Law, through the Canon Law, applied in the ecclesiastical courts (Carter *v.* Crawley, Raym. 496).

The rule of Advancement is said (Jenks, *Modern Land Law*, 211) to be derived from the Custom of London, which has a rule resembling it. In that custom, however, the rule seems to be, or to have been, somewhat more drastic. Any advancement to whatever extent was, as it seems, regarded as excluding any claim on distribution, so that there was no question of a bar *pro tanto* only, unless the father had expressly allowed it. But the custom of London is not necessarily home grown, and if we look a little further afield we can see the same rule in operation in a form more resembling the rule of the custom than that of the statute. By the custom of London there was only a very limited power of disposal of personal property by will, and in most of the pays coûtumiers of France there was, for ordinary people (roturiers), who had children, no power of so disposing of it at all. Any gift *inter vivos* might therefore be a fraud on the custom, and the rule that such gifts are to be deducted from the profit of any succession is expressly rested on the ground that a father is not to be allowed to vary what will go to his

children. It is worthy of note that the word used in the sixteenth-century customals to describe such a gift is "advancement." In modern cases the word seems to have a variable meaning: it is not easy to tell whether in any given case it is used to mean "by way of an advance on what will be coming to him," or "by way of an advancement of him in his career."

It is, however, common knowledge that even in "Pays de Droit Coûtumier" there was a very large infiltration of Roman Law, long before the sixteenth century, and the corresponding rules in Roman Law, created by the Praetor's edict, are also familiar. They are the rules of *Collatio bonorum*. It is not necessary to state them in detail, but a few points should be noted. They require emancipated children who claim a share in their father's estate, either on intestacy or in opposition to the terms of his will, to bring in for division their own property, so far at least as their claim injures those children who had not been emancipated. The rule obviously differs in principle from our own: it applies to all property, not merely to what originally came from the father, and of course it can have little or no application to those children who have remained in the family, since they could have no property of their own. Indeed, the only property which, in classical law, such a person could have as his own, the *peculium castrense*, was exempted from the liability. But the rule deals with property which has come from

the father in ways that recall our own rules. Thus the son need not bring into hotchpot what his father has at any time given him to support the dignity of any office to which he has been appointed: it is presumed that this was mere bounty (D. 37. 6. 1. 16). On the other hand, though in general *peculium castrense* need not be brought into account, yet, at least in later law, anything which the father had contributed to that fund had to be accounted for (C. 6. 20. 20. 1). It is plain also, at least in later law, that what is mainly looked at is what has come from the father, since Justinian provides that, in general, such acquisitions by a *filius familias* as under his rules do not go to the father shall not come into account, whether the son be claiming on intestacy or in opposition to the terms of the will (C. 6. 20. 21). Even in the classical law, there was one case in which the rule applied to one who was in the *familia:* a married daughter had to bring her *dos* into account. There is, indeed, some trace in the texts of a rule that she need bring in for division only such *dos* as was provided by the father. But the authorities are obscure and conflicting, and if there was such a rule it is certainly one of late law, when the large recognition of property rights in *filii familias* had nearly destroyed the significance of the whole system of *Collatio* (see as to conflict C. 6. 20. 4, 19. 1; D. 37. 7. 1. 7.) It should be added that the Roman system, like our own, does not apply to collaterals, or where the succession is to a mother

It was no doubt the existence of the statutory rule which suggested the common hotchpot clause in settlements containing powers of appointment among children with a provision for equal division in default of appointment. This clause in its turn led to the adoption of the rules concerning satisfaction and double portions which are applied in chancery. It will be remembered that these rules, like that of the statute, apply only where the settler is a parent, or a person *in loco parentis*, and not where the mother is the settler. They apply only where there is a real advancement, and not where the gift is merely bounty or payment for services rendered, and, as the rule rests on a presumption of intention, there is no application of it in cases where a contrary intent is shown. It is therefore a mere extension of the rule in the Statute of Distributions, and the Roman texts provide illustrations of an extension of the praetorian rule in the same way. These developments appear to be parallel but in no way connected. So far as can be seen, the English courts in laying down these last rules, have not gone to the Roman texts for inspiration. Yet the rules in the two systems are extremely alike.

The rule that a gift *inter vivos* may bar the *Querela inofficiosi testamenti, pro tanto,* is a simple extension of the praetorian rule to another case of exactly the same kind : it, too, deals only with persons who are claiming against a will (D. 5. 2. 25. *pr.*; D. 38. 2. 3. 18). But there are other case

much more like the equitable rule. Even where an *emancipatus* is not attacking his father's will, but is claiming under it, he may be required to bring in his property for division, if the father has expressed any desire that he should do so, in his will (C. 6. 20. 1), and the same is true of a married daughter, as to any *dos* which she has received from the father (C. 6. 20. 7). Where a man having promised *dos* to the husband, makes a legacy of the *dos* to the wife, the legacy is good, but will be in lieu of the *dos*, unless, says the text, in a clause probably due to Justinian, she can show affirmatively that the father meant both to take effect (D. 23. 3. 29). Another text, of Julian (D. 30. 84. 6), declares the gifts alternative, and one of Modestinus (D. 31. 34. 5) says that she is entitled only to any excess which there may be in either of the two gifts. This is the most significant of the texts, for, in the other two, the legacy was expressly described as *dos*, but in this case the rule applied is to any legacy to the daughter for whom *dos* has been promised. In another case a man made a will by which he left to X a certain property, " or what it may sell for." Later on he sold the property, and gave X the price, *inter vivos*. Celsus says that he cannot claim it again, unless (but these words are commonly credited to Justinian) he shows affirmatively that the testator meant him to have both gifts (D. 31. 22). But a gift *inter vivos* to a person is not necessarily exclusive of a legacy, even where the circumstances show

that the gifts are in the nature of a provision. One donee seems to have been very favourably treated. A man was in the habit of paying an annual sum to a certain *libertus* of his, one Marcus, such annuities being very usual. In his will, addressing his *heres*, he said, "*scio te de amicis meis curaturam, ne quid his desit: verum* (*velim*, Momms.) *tamen et Marco dari octoginta.*" Scaevola held that he was entitled to both the annuity and a gift under the other words (D. 33. 1. 19. 1.; *cp.* D. 34. 1. 16. 2, 20, also of Scaevola).

Upon the case most akin to ours, that of a right to appoint among a class, the evidence is scanty, but the general result seems to be this: No text dealing with a gift of specific property to be divided amongst a class and to go equally if no choice is made, suggests that the right is in any way adeemed by a gift of other property, though there is a text which assumes that such a gift is in substitution in the case of a single *fideicommissarius* (D. 31. 77. 7). But where there is a general gift for maintenance or the like, then any of the class whose maintenance has been otherwise provided for by the donor are excluded from the class, unless the contrary intent is shown, this last proviso being no doubt due to Justinian (D. 34. 1. 16. 2), since, in another text by the same jurist (D. 34. 1. 20. *pr.* Scaevola), the same rule is laid down without the saving clause. Both the provisions in these cases were in the will. In another text Valens gives the case of a man who was under

an obligation under his brother's will to provide for his brother's *liberti*. In his will he leaves to these *liberti* certain lands, adding, "*ut habeant unde se pascant.*" Valens holds, apparently not very confidently, that this gift is intended to be in substitution, so that they cannot claim under this gift without releasing their claim under the other will (D. 34. 1. 22. 1).

VII. *Restraints on alienation, inter vivos.*—The general rule of the Roman Law as of our own, was: "*dat qui habet.*" It was impossible in the ordinary way to confer ownership on a man with a condition that he should not alienate, so that the condition should have any force against a third party, who acquired from him. Texts to this effect are numerous (D. 2. 14. 61; D. 18. 1. 75; D. 45. 1. 135. 3). There are, indeed, texts which raise difficulties. One in the Digest (20. 5. 7. 2) definitely says that a pact not to sell makes a sale absolutely void. This is so contrary to the other texts in the Digest that it is almost universally held to be corrupt. Mommsen emends it so as to reverse the sense. It is, however, far from clear that this is justified. There is an enactment of Justinian which says the same thing (C. 4. 51. 7). It lays it down that where by statute or by will or by agreement there is a provision against sale, this shall have the effect of prohibiting sale, manumission and a number of other dealings. This is explained, however, as meaning that the sale is an actionable wrong and as putting on the same footing the other

dealings. But it places on the same level these contractual restrictions and statutory restrictions which were already effective "*in rem*" before Justinian, as well as prohibitions to manumit, which also made any manumission void before Justinian. It is not impossible therefore that this does represent one of Justinian's hasty and far-reaching changes. But however this may be, the tradition from the Gloss onwards has been the other way.

The exceptional restrictions which were allowed on dealings with slaves are of little importance in the general law. There is no sign of evasion by gifts of property "till alienation," possible in late law though not earlier. Such evasions would serve little purpose, since the gift of a usufruct, essentially inalienable, produced the same result. The "restraint clause" is replaced by a rule that avoids gifts between husband and wife, wider in that it affects all their property, narrower in that it affects only conveyances to the husband, or wife, by way of gift. We have already seen that the court looked keenly into attempted evasions of the rule (*ante*, p. 62).

It is clear however that in the empire permanent gifts for the maintenance of dependents and their issue, and for public and charitable objects were common. The way in which this was managed has been admirably told by Pernice (*Labeo*, 3. 150 *sqq.*), a short account of whose conclusions may be interesting. The *Donatio* of *Syntrophus*, an

account of which survives (Bruns, *Fontes*, 337), was a provision for the perpetual maintenance of certain of his *liberti*, and their issue. *Syntrophus* conveys the property to one of them with a stipulation for a heavy penalty, if he does not give the others joint ownership, and secure that the proceeds shall be rightly applied, and that the last survivor shall by his will provide for the continued application of the property to the purposes of the trust, for ever. This *libertus* will thus have to make a number of corresponding stipulations with his fellows, and persons claiming under the will of the last survivor will have to give security for carrying out the purposes of the trust, before they can claim. But all this gives little guarantee for permanence: it rests for enforcement on the goodwill of people without personal interest, and it was probably soon ended by collusion. A better guarantee was found by vesting the property in a corporate body of some kind on similar conditions, requiring as a condition of the gift that the corporation shall make a statute providing for the application of the money as desired. But a statute made to-day might be revoked to-morrow by the authority that made it, and, further, so far as the intended beneficiaries were not members of the corporation, it would not be effective. It was usual, therefore, to provide in the gift that if not applied to the intended purpose, the property should pass to some other body. But such a gift over could have no legal effect; resolutive con-

ditions were not admissible. It follows that such a direction, if enforced at all, must have been enforced by administrative machinery. Pernice remarks that the great number of such foundations of which we have evidence proves that they were protected, and it may be added that their frequency in inscriptions and their almost complete absence from legal texts shows that the protection must have been administrative. Its method we do not know.

It should be observed that in all this there is nothing to prevent the alienation of the land itself. It is only regarded as a fund that it can be kept intact. If the corporation chosen was a town, as it usually would be if the purposes were public, there was a more effective protection. It was the special duty of the *Curator reipublicae* to see to the proper administration of trusts of this kind. He held a court of administrative justice, and any aggrieved persons could come before him, though in an ordinary court they would have no *locus standi*. No land of the community could be sold without his leave, and as certain lands of the community could not be alienated at all, it is suggested by Pernice that these lands may have been in that position. There is, however, no evidence for this, and on the whole such a restriction would hardly seem to be in the interest of the trusts. Pernice points out that it is after the appearance of this *curator*, and the imposition of this duty upon him that these gifts become frequent,

and it is also noticeable that land is far more commonly chosen than any other form of endowment. In one case that has come down to us there was a gift of land, not to a town, but to the collective *collegia* of a town, on public trusts with a prohibition of alienation (see Bruns, *Fontes*, 400). It does not appear, however, that this could have had any force in strict law. There was no gift over, and, moreover, the whole arrangement seems to have been carried through *inter vivos*, so that a gift over could not have been operative by ordinary law.

Pernice mentions a method, evidenced by two cases, of keeping control of the capital. This was by creating what was in effect a rent-charge. The property was conveyed to the town, and received back at a *vectigal*, which was to be applied under the trust (Pliny, *Litt.*, 7. 18; Bruns, *Fontes*, 351. The real significance of this last case is obscure and controverted).

Altogether it seems clear that restraints on alienation *inter vivos* played but a small part in the practical everyday Roman Law.

VIII. *Restraints on alienation, by Will. Perpetuities.*—There is no lack of evidence that among the Romans of the Empire the desire of perpetuating the family name by settlements of property was extremely strong, and as restrictions on alienation created by will are most commonly framed with this aim, it may be well to consider them in connection with another topic, *i. e.* the Roman equiva-

lent for rules of remoteness and perpetuity. During the Republic, the power of settling property seems to have been very small. No *incerta persona* could be instituted *heres* or receive a legacy, and thus, though a testator might create a series of successive usufructs, they must all be to existing or inchoate lives, so that property could hardly be tied up for more than a life and the period of gestation. The right to institute *Postumi* looks at first sight like a considerable extension of this. We know that at civil law the rule was early developed that *postumi sui* of a certain class, *i. e.* children born after the death of the testator, could be instituted by anticipation, and that this power was gradually extended to other cases of *postumi sui*. But, it appears that all such *postumi* must have been born or conceived at the time of the testator's death. It must be remembered that the power of instituting *postumi* was not primarily intended to enlarge the power of testation, or settlement, but to prevent the intestacy which would otherwise result from the appearance of a *postumus*. The praetorian right of institution of *Postumi alieni*, a puzzling matter in itself, into the reasons for which we need not go, does not in effect carry the matter any further.

The recognition, however, of *Fideicommissa* provided a means of going very much further in this direction. These could at first be made in favour of *incertae personae*, and they could always be charged on *fideicommissarii*. It was possible,

therefore, to burden each successive *fideicommissarius* with a trust to hand over the property at his death to his son, and so on in perpetuity. We know indeed that such things were done. The will of Dasumius, made in A.D. 108, is still in existence (Bruns, *Fontes*, 304). It gives certain lands to *liberti*, without power to sell or pledge, with a right of accrual, or survivorship, followed by a direction that when the survivor is dead, the lands are to go to the *posteri* on the same terms. The last of them all is to have free power of disposition. It is difficult to conceive a more complete perpetuity. Whether such things were usual or not can hardly be said—in any case the right to do them was lost, when under Hadrian (G. 2. 287) *fideicommissa* to *incertae personae* were forbidden. It may be noted that the will, as read by Mommsen, contains, in the institution of the principal *heres*, a condition that he shall take the testator's name.

But what may be called family trusts, created by will, appear to have been common not only before, but after this change in the law. Some testators seem to have tried to meet the difficulty by inserting in their will a simple direction to the *heres* not to alienate the property, either *inter vivos* or by will. Doubts arose as to the effect of such a direction, and Severus and Caracalla legislated on the matter. They declared that such a direction was a mere nullity, as being a mere *nudum praeceptum*, which a testator could not

make binding on his *heres*. But the direction was to be valid (in what sense will shortly be considered), if the will showed that the restriction was in favour of any particular person, *i. e.*, it was valid if on the construction of the whole will it appeared that there was a *fideicommissum* in favour of any one (D. 30. 114. 14). The persons concerned will ordinarily be the family, the direction being usually, in effect, to keep the property in the *nomen et familia*. There are of course other cases. These *fideicommissa* for the benefit of the family are discussed in a large number of texts. In some of them the question is whether on the words of the will such a trust can be made out at all, or whether it is a mere *nudum praeceptum* (D. 31. 67. 3, 77. 24; 32. 38. 3, 4, 7; 36. 1. 76. *pr.*). In others the question is whether or not there has been a breach (D. 30. 114. 15; 31. 67. 3). In some cases, there is a trust in favour of a particular line, to the exclusion of others, one testator being particularly candid as to the merits of the persons who are to be excluded (D. 31. 88. 16). It is not necessary to go into details, but three or four points are of interest in comparing the institution with our own.

1. Though the trust was in general terms "for the *familia*," an exclusive appointment to one was good, and destroyed any claim in the others, but if no appointment was made the property was divided equally, the nearer excluding the more remote (D. 30. 114. 17, 18;

31. 67. 2, 69. 3; 32. 94). The last of the claimants could dispose of the property as he liked (D. 31. 78. 3), unless, as was often the case, there was an ultimate remainder to, *e. g.*, a town (D. 32. 38. 5; 33. 2. 34. *pr.*). Presumably, though this cannot be clearly made out, the distribution was *per stirpes.*

2. It was no breach of the trust to sell the property to pay the testator's debts, or to pay off creditors whose money had been used to pay off such debts, provided in both cases, at least in later law, that there was no other means of paying them (D. 30. 114. 14; 31. 69. 1, 78. 4; 32. 38 *pr.*).

3. To what extent does such a trust create a perpetuity? There is great difficulty in making out the classical law, as many of the texts have evidently been altered by Justinian's compilers. The rule is laid down, by Modestinus, that the expression *familia* covers those who were alive at the testator's death, and their immediate issue, but no further (D. 31. 32. 6). That is to say, such a gift is not effective to benefit the child of an unborn beneficiary, a rule recalling that applied in Whitby *v.* Mitchell, though obviously differing from it in its mode of application. The rule is a bold juristic extension, for it certainly covers some *incertae personae.* The text adds that the testator can extend this, but it is clear that these are Tribonian's

words. It may, however, have been possible to go beyond this. We are told that a *fidei commissum* may be imposed on the *heres* of the *heres* (D. 32. 5. 1, 6. *pr.*). But from the illustration given in the text, and set down to Julian, it seems likely that this power would not enlarge the class, but merely postpone the distribution.

4. The difficult point remains : how far did these restrictions operate *in rem?* Was an alienation by the *heres* void, or was it merely an actionable wrong ? A text of Paul tells us (P., *Sent.*, 4. 1. 15) that in any case of *fideicommissum*, if the *heres* sold the property, the *fideicommissarius* could get *Missio in Possessionem* against a buyer who had notice of the trust. This rule looks very modern, and is, as has already been noted, the nearest approach which Roman Law gives to our equitable ownership. The sale is valid, but can be set aside. We know little of the working of this rule, but we learn from another text the significant fact that where such a grant has been made, the *fideicommissarius* is not left to the feeble resources of the ordinary law, such as have already been discussed, but will, if he prefers, be given actual possession, *potestate praetoris* (D. 43. 4. 3. *pr.*), a help which was not available in other cases of *Missio in Possessionem.* The rule is not apparently known to Gaius, and may not have

been as general as it looks. It is alluded to elsewhere in the Digest once or twice (D. 31. 89. 7; 32. 38. *pr.*), but it was already abolished. Justinian, recasting the whole institution, sweeps it away, calling it a *tenebrosissimus error* (C. 6. 43. 3. 2). Later, in a historical disquisition on the whole matter, he describes it as having been an obscure, roundabout, and ineffective protection (Nov. 39. *pr.*). It was ineffective, no doubt, in that many cases would break down on the question of notice; roundabout, in that *Missio in Possessionem* left the alienee owner instead of simply avoiding the sale, and the possibilities of further sale by him to a *bona fide* buyer, might make the matter extremely *tenebrosum.* But these provisions are independent of express prohibition to alienate: what was the effect of this further provision? The texts, some of which have been altered, tell a very confused story, but the most probable, though far from certain, result of them is that where there was such a prohibition the sale was absolutely void, unless it was for payment of debts of the estate, but the *heres* himself was not allowed to set up this invalidity (see C. 4. 51. 7; C. 6. 43. 3; C. 7. 26. 2.; D. 31. 69. 1; D. 32. 38. *pr.*).

Under Justinian there were great changes. It is made clear, so far as Tribonian's style makes anything clear, that property subject to a *fidei*

commissum could not be alienated as against the beneficiary: any such transaction was to be, in effect, subject to a resolutive condition (C. 6. 43. 3. 3.). But another, and far more important change, was made in authorising all forms of gift to *incertae personae*. There does not, however, seem to be any evidence that either institutions of *heredes* or usufructs were used to create perpetuities. So far as *institutiones* were concerned, the rule that the *heres* must have been born or conceived at the testator's death still held. But *fideicommissa* were available and were used. The *heres* might be directed to hand over so much of the property as would leave him his statutory quarter intact, to his son, and so on in perpetuity. The life interest of the *heres* would usually cover that quarter, and indeed, Justinian allowed the testator to forbid the retention of a quarter. Accordingly it was not long before actual perpetuities began to be created. In Nov. 159 a case is recorded—one may almost say reported, for the account of issue, argument, and judgment is very complete—in which by his will a testator ties up certain properties for two generations, and in a later codicil gives an estate to a grandson with a direction for perpetual devolution in his family. The grandson himself obeyed the directions in the codicil, but the litigation was on the question whether his son had done so. The case arose unexpectedly soon, since the grandson and his son, who died under age, were all dead during the

life of the eldest son of the original testator, who was the plaintiff in the suit. It is not necessary to go into the details of the complicated case, which played an important part in the recent case of Strickland and Strickland (1908, App. Ca. 551). The actual decision was that there had been no breach of the directions in the codicil. But the Emperor observes on the extraordinary and undesirable nature of the limitations, and proceeds to enact two things. By way of *ex post facto* legislation he remarks that in the particular case, the thing has been going on long enough, and he provides that the persons now holding the property under the last devolution under the codicil are to be at liberty to deal with it as they like. He then goes on to provide that for the future such trusts for the benefit of the family are to be of no force after the fourth generation. The rule is, for some reason, confined in terms to an exactly similar case *i. e.* a case in which the successor in the fourth generation succeeded through one who died under age. But it has always been understood as being perfectly general, and it is so stated in the short account of it which is all that now survives in the *Basilica* (*Bas.*, 36. 1. 25), though they originally contained a full account of the case. The litigation arose in A.D. 555, and it is not unlikely that the will was made before, and the codicil after, Justinian's changes. The rule still exists in those parts of our empire which are governed by Roman Dutch law.

IX. *The rule in Tulk* v. *Moxhay.*—The Roman law of Easements or Praedial Servitudes is very like our own, to which it has indeed obviously served as a model. Maitland (Azo and Bracton, 85, 131) shows us Bracton borrowing from Azo some general conceptions of the matter, and the reports deal a good deal in Roman Law. Both systems avoid attempting any limitative enumeration of easements, but assume them to be innumerable. Both systems exclude certain forms of advantage derived from another person's land, and in each case the distinction seems to be that the advantage enjoyed is not essentially connected with the enjoyment of the dominant land. You cannot, says Paul, have a servitude to pick the apples or walk about or picnic in your neighbour's land (D. 8. 1. 8. *pr.*). The so-called *Ius Spatiandi* occasionally referred to (*e. g.* Attny. Gen. *v.* Antrobus, 1905, 2 Ch. at p. 198) does not appear as an easement in the Roman Law. Each system allows prescription for what would otherwise be a private nuisance (D. 39. 3. 1. 23; 8. 5. 8. 5–7). There are traces in Roman Law of the view that long-continued enjoyment is evidence of a lost grant (D. 39. 3. 1. 23), but that does not seem to be a real factor in the law : long-continued enjoyment is considered as, *per se*, a root of title (D. 8. 5. 10). Grants of rights in gross in the nature of easements had in Roman Law, as in the Common Law, only the force of contracts. Such contracts, *i. e.* imposing restrictions on enjoyment, were valid if

made by stipulation, or if, being embodied in an informal contract of sale, there was any *interesse* in the vendor. It is, however, worthy of notice that in regard to one class of chattels, *i. e.* slaves, it was possible to attach on alienation restrictive covenants which operated *in rem.* Thus, if a slave were sold or left or given on the terms that he was not to be freed, this restriction "*cohaesit personae,*" and bound any holder, whether with notice or not, making any attempted manumission a nullity (D. 29. 5. 3. 15; D. 40. 1. 9, *etc.*). A legacy of a slave with a direction to free him, gave the slave a claim to freedom into whatever hands he passed, and we have already seen that there was a similar rule in the case of transfers *inter vivos* in the later classical law. A sale of a slave, on condition that he should be exported, bound third persons, even without notice of the restriction (C. 4. 55. 1; Vat. Fr. 6). But it does not appear that this idea was extended to any other forms of property.

The need for the rule first laid down in Tulk *v.* Moxhay (2. Ph. 774), which does not seem to have been felt, or, at any rate, satisfied, till 1848, was not likely to be keenly felt in the much less complex Roman civilisation. Nevertheless there are distinct signs of its development. In one case a man bought a slave, and covenanted that he would not employ him in certain ways, the restriction being not one of those above mentioned as having been specially protected. The buyer died, and

left to X a usufruct in the slave, not expressly imposing this covenant. Is X bound by the restriction ? He is not of course bound by the agreement, but Ulpian lays it down that he must observe the restriction, otherwise he is not enjoying the property *boni viri arbitratu*, a way of putting the matter which seems to imply that he has notice (D. 7. 1. 27. 5). It must be observed, however, that it is the *heres*, who is himself liable to a penalty under the agreement, who enforces this against the usufructuary, not the original vendor. In another case which is considered by the same writer, the owner of lands fronting the sea, sold part of them, and covenanted that there should be no tunny fishing on the sea off the part which he retained. He made this covenant in the form of the creation of a servitude in favour of the land which he kept. Ulpian remarks that this purports to be a servitude over the enjoyment of the sea, not of the land. He lays it down that there cannot be a servitude over the sea, but he adds that good faith requires the terms of the agreement to be observed, and that the agreement is binding on *possessores* and on *successores in eorum ius* (D. 8. 4. 13. *pr.*). It may be possible to read this text as meaning merely that though the sea is common, it is possible to make valid agreements as to what shall be done on it. But apart from the extreme platitude of such a remark, this interpretation is difficult to fit to the words *personae possidentium aut in ius eorum succedentium* . . .

obligantur. Both the expression *possidentium* and the form *successores in eorum ius* are extraordinarily chosen if the meaning is only that the buyer and his *heredes*, the only persons who could be bound by a contract, are liable, though the acts be done by other successors, but this is the sense in which Bartolus understood it. The true meaning of it seems plainly to be that the burden of the covenant runs with the land sold, though it cannot be said that the benefit of it runs with the land retained. It will be noticed that the transaction is a sale, not as in the last case, a lucrative acquisition. On the other hand, the allusion to good faith, as applied to successors, seems to imply notice. On that view the text lays down the rule that the burden of restrictive covenants other than servitudes can, possibly, run with the land, at any rate, as against a holder who acquired the land with notice of the restriction. But the text is isolated: There is no reason to suppose it expresses a general rule: there is no sign of any further development, and the wording of the present text is scarcely wide enough to cover either of the developments in Nesbitt and Potts' contract ('06, 1 Ch. 386).

X. *Election*.—This doctrine is defined by Maitland (*Equity*, 225) in substantially the following terms: He who accepts a benefit under an instrument must adopt the whole of the instrument, conform to all its provisions, and renounce all rights inconsistent with it. If he insists on rights

outside the instrument he can take nothing under it unless he compensates those whom he disappoints by insisting on his right.

This kind of point could hardly arise in Rome except under wills, and in relation to wills the law as to gifts of *res alienae* was so different from our own that something resembling election, but differing both in principle and detail, was the ordinary law. A gift of a third person's property by will was a valid legacy, though it conferred no *ius in rem* and the owner was in no way bound to hand it over, and a direction to any person to give any specific piece of property of his was a valid *fidei commissum*, binding on him, if he accepted any benefit under the will, irrespective of relative values (D. 31. 70. 1). As in classical law the judgment would always be for money, the effect of such a *fidei commissum*, if it was disputed, would be much the same as an election against the gift and compensation of the disappointed party. Keeping clear of *fideicommissa*, we shall find cases which bring us, not indeed much nearer in actual rule, but much nearer in way of thought. If an owner of land in which another had a life estate (*i. e.* a usufruct) devised it, it was presumed that he devised only what he had : the *heres* was not bound to get in the life estate or pay its value. (This was, of course, by no means an inevitable presumption in Roman Law, since gifts of the property of a third person were valid.) But if on the same facts the life tenant and the *heres* were

the same person, then, if the land were left to T, the *heres* if he accepted the inheritance must give T the whole interest. It is not a *fideicommissum*, but a direct gift, and Papinian holds that the *heres* is not entitled to disregard the plain intent of the testator and keep the usufruct (D. 31. 26, 76. 2; see also D. 38. 2. 41). But in Roman Law it is entirely a question of intention. If I make you my *heres*, and leave to T land which is yours, but which I thought to be my own, T has no claim (D. 31. 67. 8; cp. Parker *v.* Sowerby, 4 De G. M. & G. at p. 37). The law of *Dos* provides some similar cases. The husband could not alienate land forming part of his wife's *dos*, though he was *dominus* of it. A certain husband, however, did so, the wife being entitled, therefore, to set the sale aside. In his will he left money to his wife, and requested the buyer of the land to pay the price to the wife. This was no *fideicommissum* on him, for he took nothing by the will. If the wife accepts the gift to her, and claims to annul the sale, she will fail if the buyer tenders the price to her (D. 31. 77. 5). No doubt if the *heres*, who is, in strictness, entitled to the price, sues for it, he will be met by an *exceptio doli*. In a case in which the husband made the wife his *heres* and devised the dotal land to T, the rule laid down was that if the wife accepted the *hereditas*, she must make good the devise, if the *hereditas* was worth as much as the *dos*, but if it was worth less she might deduct from the devise of the land the amount of the deficit (D. 23.

5. 13. 4). That is to say, she takes the whole of the *dos*, to which she is of course entitled apart from the will, but out of any excess in the inheritance she must compensate the devisee of the land so far as it will go. This seems to be exactly the equitable rule. She elects against the gift of her property, but is still entitled to take the gift to her, provided that out of it she compensates the devisee, so far as it will go. It must be borne in mind that the *hereditas* which she takes includes the *dos* to which she is entitled in any case.

One pair of texts offers a striking contrast. Land is left to a man with a *fideicommissum* to give it on his death to the *familia;* in effect this is a power to appoint amongst issue, to whom the fund will go in equal shares in default of appointment. Exclusive appointments were valid and destroyed all claim of the others (D. 31. 67. 2, 6). He left the land to one son with a *fideicommissum* to give the property on his death to T, a stranger. Is the trust binding on him ? Yes, says the text, provided that *fundi pretium efficiat* (D. 31. 67. 5). These words are obscure, and have been variously understood and supplemented. However they are dealt with they show that in some event the stranger T can claim, though the property is such that the *heres* who created the trust had no right to do so. The text, however, goes off on other points. In another text, the *heres* under the same instructions, makes one son his *heres*, and adds a direct gift of the land to a stranger (D. 31. 67. 3).

Here the appointment is a nullity. The devise fails and the children divide the property. The direct gift of the land to the stranger negatives the inference, drawn in the other case, that the institution of the son as *heres* was intended to be an appointment to him. There being thus no appointment at all to any child, there is no case for election, and the direct gift which fails is not a *fideicommissum* binding on those who take the property. If part had been left to the stranger, there would have been no appointment of that part, but the institution would have been an appointment of the rest (D. 31. 67. 4). In another case A was under a *fideicommissum* to leave certain lands of his to B. He made her *heres* directing her to give this land to X. The *fideicommissum* is binding on her, as it would have been had the land been her own. This is not exactly election, because the direction is express, but it gives the same result (D. 31. 77. 7).

Where a will is upset by *Bonorum Possessio contra tabulas*, by persons who have not received so much as they are entitled to claim, certain legacies nevertheless stand good. But this does not hold good in the case of a legacy to the person who upset the will, even if he is in the privileged class: he may not both approbate and reprobate (D. 37. 5. 5. 2).

CHAPTER V

MISCELLANEOUS CASES—CONCLUSION

THE topics dealt with in the following pages will be those which cannot be said to belong specially either to the law of contract or to the law of property. They are, of necessity, a rather unclassifiable collection.

XI. *Fund.*—It is difficult to define a "fund" with exactness, but in Maitland's posthumously published lectures on Equity (p. 172) we have a very vivid picture of the protean character of the "Trust Fund." In discussing the law as to "following the trust fund" he describes it as retaining its individuality through any number of changes of form. At one moment land, then a banknote, then a debenture, then a railway share, and so forth, through all these changes it is the same fund, a notion which brings us face to face with the fundamental problem of identity. One aspect of the question, no doubt the most important in modern equity, that of following the trust fund in the hands of third persons, is represented in Roman Law only very imperfectly. The closest approximation to it is in connection with the *hereditatis petitio.*

The nearest equivalent to the term fund in Roman Law seems to be the expression *universitas rerum*. This term is, however, ambiguous, but for the present purpose it may be regarded as meaning a combination of things which can be so far contemplated as a legal unit as to be recoverable by a single real action, the applicability of which is not affected by any changes which may occur in the constitution of the artificial unit. The simplest illustration of this is the *grex*, a flock or herd, which is conceived of as a unit, for the purpose, for instance, of a life interest, without reference to the changes which may have occurred in its constitution. Thus, Ulpian quotes Marcellus as saying that if I own a flock, and I replace those that I lose, by purchasing sheep from one who does not own them, so that a time comes when my flock consists wholly of sheep of which I am only a *bona fide possessor*, I can still "vindicate" the flock as mine (D. 6. 1. 3. *pr.*). But the recognition of this individuality was very incomplete—a flock as such could not, for instance, be acquired by *usucapio* (D. 41. 3. 30. 2). A *Dos* cannot be called a *universitas* in the same sense, since there is no real action for its recovery as a unit. But the power of the husband to change the investments (apart from the case of land), in such wise that the new acquisition shall become part of the *dos*, is fully recognised, the husband's liabilities, as to care and the like, in respect of it being the same as if it were the original property (D. 23. 3. 26, 27). The text

says that the new acquisition becomes *res dotalis*. Earmarked in this way it becomes the subject-matter of the priority of claim which the wife has over creditors of her husband, in *res dotales*, whatever the priorities of date or privilege which might attach to the creditors' claims, a priority which is based by Justinian, in language which recalls the equitable estate, on the natural ownership which remains in the wife notwithstanding the subtlety of law which has vested the *dominium* in the husband. That is to say, the investments of *dos*, and the moneys which have been received on their sale can be picked out from among the husband's assets, as against his creditors in bankruptcy (C. 5. 12. 30). We are also told that she can enforce this right even during the marriage in case of need (C. *h. t.* 29).

By far the most striking, however, of these feats of abstraction is the conception of the *hereditas*, if we consider the extremely early date at which it developed. It seems to have been not long after the XII Tables that the pontiffs arrived at the idea of the *hereditas* as a unit, capable of being possessed and acquired by usucapion (G. 2. 54; see Girard, *Manuel*, 874). Later on, but still early, the notion of *cessio in iure hereditatis* appears, *i. e.* the *hereditas* as a unit can be transferred by a *heres legitimus*, before entry (G. 2. 35; 3. 85–87). And throughout the history of the law it remains a unit recoverable by a single action *in rem*—the *Hereditatis petitio*. The *hereditas* for the purpose

of this action consists, broadly, of the property of the deceased, exclusive of debts due to the estate, *i. e.* it covers the *iura in rem* of the estate. The action is available to the *heres* against any person who holds this property or any part of it, either as claiming to be *heres*, or without any assertion of title at all. But it does not lie against any one who holds under any other claim of title, well or ill founded, in good or bad faith. It does not lie, for instance, against one who says that he had bought the property from the deceased—against him there are other remedies (D. 5. 3. 9–12). To be strictly accurate it should be said that where the person who withholds the property, claiming to be *heres*, is also a debtor to the estate, his debt can also be recovered by this action, but this is substantially as an accessory to the *iura in rem* which are the real subject-matter of the action (D. *h. t.* 13. 15). The question at once suggests itself: what constitutes holding property of the estate? It is not necessary to go into details, some of which are extremely obscure and controverted, but it may be said that so far as the claim against the soi-disant *heres* is concerned, the estate is represented by its present investment, the claimant having in some cases the choice whether he will have the present investment, or the sum which was expended upon it (D. 5. 3. 16. 1, 20. *pr.*, 1. *etc.*). There was one case, and as it seems one case only, in which the fund so contemplated as a whole could be pursued into the hands of a person

other than the holder *pro herede*. Any one who acquired it as a whole from the soi-disant *heres* under some title other than inheritance, *e.g.* by gift or purchase, or provision of *dos*, was not in strictness liable to this action, because he claimed under an independent title, not as *heres*. But the *hereditatis petitio utilis* could be brought against him, the fund in its present form being recoverable from him, as if he had claimed it as *heres* (D. 5. 3. 13. 4–10). This, however, would not apply to an acquirer of a specific thing. Against him there would be a *vindicatio* of that thing, but to recover in this the *heres* would have to show that the particular thing had formed part of the original inheritance.

The *Peculium* is not a *universitas*, in the sense that it could be recovered as a unit—there was no special real action for it as in the case of the *hereditas* (D. 6. 1. 56), but it constitutes, nevertheless, the best example of a fund in the modern sense. It is a mass of property, placed in the hands of a slave (or *filiusfamilias*) which he might deal with more or less as his own, having in some cases, but not in all, a power of alienation, the *paterfamilias* having the right to recall it at any moment, subject to the right of any creditor, who had had dealings with the slave, to recover out of it, so far as it would go, any contractual or quasi-contractual debt due to him. This conception of the *peculium* as a fund independent of its momentary form gave rise to many questions of interest, since the

peculium was a very important factor in Roman life, and some of these questions were of considerable subtlety. Legacy of *peculium*, to the slave himself or some other person was very common. What would happen if in early times the *peculium* had been left to some one *per vindicationem?* This seems in fact to have been the usual form for such legacies. But property left *per vindicationem* must have been the property of the testator when the will was made. Would such a legacy fail so far as investments of the *peculium* had changed ? The only text which deals with the question gives no conclusive answer (D. 33. 8. 11; cp. D. 32. 17. *pr.*). The point is disputed among commentators, but the better view seems to be that the legacy was good, and covered the existing assets, the *peculium* being for this purpose contemplated as a fund, and not as a collection of specific things.

When a dominus is sued *de peculio* he is entitled to deduct from the fund any debt due to himself, the idea being that as, in this action, the rule is " first come first served," his first step on being threatened with an action will be to set aside, without necessarily removing it from the possession of the slave, enough to satisfy his own claim. Money so deducted is *ipso facto* not in the *peculium* for the purposes of other creditors. As he can deduct for himself, so too he can for debts due to other slaves of his, and thus in effect to himself. But the rule is carried further. The question is asked : can he deduct for debts due to his *pupillus ?*

The answer given is in the affirmative, and the ground assigned by Ulpian recalls the language of English courts dealing with the case of a trustee who has paid trust funds into his own account, and has then drawn cheques against the account. We must assume him, says the Court, to have done what an honest man would, and thus to have drawn on his own money first. In somewhat similar manner Ulpian and Pedius reason in the present case. We know, they say, that in general a guardian is bound to look after the interests of his ward even when they are adverse to his own (see for a strong case, D. 46. 1. 69). So, too, here, as we assume him to have looked after his own interests, we must assume him to have looked equally well after those of his ward. The creditor's claim having created an emergency, we must suppose the guardian to have set aside out of this fund, which belongs to himself, enough to meet the claim of the ward which is payable only out of that fund, and not left it to be liable to his own creditors (D. 15. 1. 9. 2–4).

The liability of the master does not necessarily cease with his ownership of the slave : he remains liable for a year if he retains the *peculium*. This rule gives rise to a question of importance and difficulty. What amounts to retaining the *peculium?* We can consider only a few of the many points which suggest themselves. If the man is sold with the *peculium*, and a price is set on the *peculium*, then the price so set is the *peculium*

(D. 15. 1. 33, 34). But how if there was a lump price? Ulpian appears to hold that no part of the price is *peculium*: the remedy will be wholly against the new owner (D. 15. 1. 32. 2), a rule which might be a denial of justice, for the new owner might not have given the fund, or any other, to the slave as *peculium*. No doubt, in practice a separate price was fixed, if the *peculium* was of any importance: the fact that defect of title might create a liability for double the price of the slave gave another practical reason for this. How if the slave is freed or given as a legacy, with the *peculium* in each case? Here the jurists were at loggerheads, the older view making the freedman or legatee liable (D. 14. 4. 9. 2; D. 15. 1. 35, *etc.*), while the later view made the *heres* liable, so that he would have to take security before handing over the *peculium* (D. 14. 4. 9. 2; D. 15. 2. 1. 7; D. 33. 8. 18). The justification for this view is that the edict obviously intends a liability of the late master, and therefore of his *heres*. But it is also clear that possession of the *peculium* is material, and the jurists are much put to it to show how on such facts the *peculium* can be said to be retained. On one view, to hand it over without taking security is *dolus*, so that it is still chargeable. But this solution obviously begs the question, for it assumes liability (D. 14. 4. 9. 2; D. 15. 2. 1. 7). The boldest effort is that of Caecilius (presumably Africanus), who holds that as by handing over the *peculium* he has freed himself

from the liability to hand it over, he is thereby enriched, so that he still has the *peculium* (D. 15. 2. 1. 7). It may be, as is held by some commentators, that the decision depended on the question whether the legacy was *per vindicationem* or *per damnationem:* these distinctions having disappeared under Justinian, some of the solutions may be supposed to have become unintelligible as applied to the new state of affairs.

XII. *Guardianship.*—The functions of the Lord Chancellor in the appointment and supervision of guardians, are said to be in exercise of the duty of the King, as *Parens patriae*, to look after those who are without other protection. The similar function of the magistrate in Rome is no part of his original office. We are told that it is not part of his *imperium* or of his *iurisdictio*, but exists only in so far as it has been directly imposed on him by a piece of express legislation (D. 26. 1. 6. 2). In our law there has been a good deal of statutory regulation, and the resulting rules are very similar.

It will be remembered that the powers of alienation of the *tutor* of an *impubes infans* are very large, and indeed such a *tutor* is more like a trustee, for practical purposes, than is any other Roman institution. It will be remembered also that the modern guardian by will has the powers and liabilities of a trustee. The XII Tables provide for the guardianship of madmen and certain *prodigi* by their relatives. In both cases

the Praetor extended the guardianship to analogous cases, but here he appointed special guardians, not necessarily relatives, and he gradually developed the practice of appointing these special *curatores* even in the cases which came within the letter of the XII Tables (Girard, *Manuel*, 223; Roby, *Rom. Pr. Law*, 1. 121). The Chancery does not seem to have gone so far as actually to supersede the customary and statutory methods of appointment of guardians, but it has intervened very freely where need arose by removing guardians and replacing them by others, and by appointing persons to act with the legal guardian. In Roman Law there are many illustrations of similar interference. If several *tutores* are appointed by the father's will, and he names one to be the active *tutor*, the Praetor will override this selection for sufficient reason (D. 26. 7. 3. 3). If the testator declares that the *tutores* are to be free from accounting, the Praetor will nevertheless require them to show good faith and due care in their administration (D. *h. t.* 5. 7). If the testator in his will has directed things to be done which are undesirable in the interests of the estate, the *tutores* may disregard these instructions under the direction of the Court, which will vary the instructions, as seems to it desirable (D. *h. t.* 5. 9; D. 33. 1. 7). The *tutor* is not to be allowed to spend what he likes on the maintenance of the child : the allowance must be proportionate to the means available. In this connection there

is a rule which seems severer than our own. If the will, or even the magistrate, has allowed too much for *alimenta*, the *tutor* is bound to get the order altered, being personally liable if he fails to do so (D. 27. 2. 2. 2). This is no doubt a late juristic development: it is clear that the obligations of the guardian were gradually stiffened. The rules applied as to liability where one *tutor* is active while the others are merely *honorarii* are very like those applied in equity where one trustee allows money of the trust to remain in the hands of another trustee, without inquiry. Thus we are told by Ulpian that the *tutores honorarii* are bound to watch the proceedings of the active *tutor*, to interfere if they see him administering wrongly, and in particular to see that all moneys received are properly dealt with (D. 26. 7. 3. 2). So too, any *tutor* is liable for the wrongful act of any other *tutor*, if he knew of facts which would have justified his removal, or the requirement of security (D. 26. 7. 14).

It should be added that the well-known rule that *tutela* was a public office, and that the Court would remove any *tutor* for cause shown by any person, whether interested in the estate or not, expresses the same notion of public control. It is perhaps over-fanciful to see in the gradual change in the conception of *tutela*, from an institution for the protection of the estate in the interest of those who would get the property if the child died, to that of an institution for the

protection of the interests of the ward himself, an analogue to the change from the idea which underlies guardianship in chivalry to that of modern guardianship.

We know that a trustee who uses trust moneys for his own purposes must account for all profits. In this respect the *tutor* was treated more like an executor: we are told by Ulpian that he must pay interest, but that he need not account for what he has received (D. 26. 7. 7. 4). In this case, and in that in which he has the money but denies that he has it, or refuses to pay it over, after notice by the Praetor, a high rate of interest is due, while a lower rate is exacted from one who merely holds the money (D. 26. 7. 7. 10). On the other hand, a *tutor* who borrows the ward's money from another *tutor* is not regarded as using it for his own purposes unless the transaction was with an eye to his own interests rather than to those of the ward (D. 26. 7. 54). In one recorded case it is difficult to feel that justice was quite done. One of brothers, partners in everything, died, and appointed his brother *tutor* to his son and *heres*. The business was sold to a third person. The uncle afterwards bought it from the third person and carried it on for his own purposes. It was held that he was entitled to do this, rendering no account whatever (D. 26. 7. 47. 6). Our informant, however, is Scaevola, who in his usual manner gives us nothing in the way of reasons, and confines himself strictly to the facts as stated.

And in the facts as stated there is nothing said about collusion, though it can hardly be doubted that the suspicion of this underlay the complaint. On the other hand, where a *libertus* was made *tutor*, and directed to carry on the business as before, he was bound to account for all receipts, and not merely to pay interest (D. 26. 7. 58. *pr.*). The same distinction is drawn in the case of a *procurator*. If a *procurator* lends my money, with or without authority, he must account for all receipts (D. 17. 1. 10. 3). The point is that in both these cases he is acting as a mandatory or agent, and the obligation to account is an obvious term in such a contract. If he was instructed to make the loan, but to exact no interest, and nevertheless did exact it, he must account. But if he lent entirely at his own risk, and without any authority, this is a transaction of his own and he need account for nothing at all (D. 17. 1. 10. 8). This rule applies also in the case of a partner (D. 17. 2. 67. 1). There is no injustice. If the principal or the other partner demands the money the *procurator* and the *socius* will be liable for interest from the demand (D. 17. 1. 10. 3; 17. 2. 60. *pr.*).

XIII. *Fraus Legi, etc.*—Attempts to evade rules of law by keeping the letter while breaking the spirit were as common in Rome as they have been in our courts. Some of these are dealt with by *Senatusconsulta, e.g.* frauds on the *Lex Fufia Caninia* (G. 1. 46), on the *L. Aelia Sentia* (D. 40.

9. 7. 1; C. 7. 11. 4), and on the rules excluding certain persons from claiming under wills (Ulp. 25 17). Some are dealt with by imperial enactment, *e.g.*, some frauds on the last-mentioned rules (D. 30. 123. 1; D. 34. 9. 18. *pr.*), and on the provisions for sanctuary for ill-treated slaves (D. 1. 6. 2). Some are dealt with by the Edict, *e.g.*, by the rules as to pacts (D. 2. 14. 7. 7), and in the edict of the Aediles (D. 21. 1. 44. *pr.*). But there are many cases in which a transaction is set aside as being a fraud on the law without reference to any legislation. It is an act of the court, which is in effect a rule established by the jurists.

Juristic intervention of this sort does not appear to be very early, at least in relation to frauds on legislation. Pomponius appears as declaring a transaction null for being *in fraudem legis* (D. 28. 7. 7), but this is in connection with the laws excluding persons from taking under wills, which we have just seen to have been dealt with by both the Senate and the Emperor. Terentius Clemens seems the earliest. He declares void transactions which constitute frauds on the *leges caducariae*, and uses language which makes it clear that the rule he is laying down is juristic (D. 35. 1. 64; D. 29. 2. 82). Then we have Papinian dealing similarly with transactions in fraud of legislation as to interest (D. 19. 1. 13. 26) and of the *leges caducariae* (D. 35. 1. 79. 4). A little later Scaevola deals with transactions in fraud of an edict as to thefts by slaves (D. 47. 6. 6), of the *lex Falcidia*

(D. 35. 2. 27), and of the *leges caducariae* (D. 22. 3. 27). As might be expected there is more sign of the activity of Ulpian. He deals with evasions of the law which requires a *libertus* of a certain wealth to leave a certain share to his patron (D. 37. 14. 16), but this comes under the *leges caducariae*, and may have been already provided for, with evasions of the *Sc. Macedonianum* (D. 14. 6. 7. 3) of the *Sc. Velleianum* (D. 16. 1. 8. 6), and of the *lex Iulia de adulteriis* (D. 40. 9. 14. 5). Paul deals with cases under the *Sc. Silanianum* (P. 3. 5 13), and both he and Ulpian lay down a general rule that a transaction is bad if it tricks the spirit of the law while observing its letter (D. 1. 3. 29. 30).

Agreements may be evaded in the same way, and the same protection is needed. It is not prominent in the texts, but it does occur. Thus Alexander forbids an act which is an evasion of an agreement (C. 4. 56. 3), and the jurists appear very early in this field. Where a husband divorced his sick wife merely in order to divert the destination of the *dos*, it is laid down by a jurist as early as Sabinus that this is a mere evasion, and that the *dos* will go, by means of an *actio utilis*, where it would have gone apart from the divorce (D. 24. 3. 59).

XIV. *Maintenance.*—The equitable rule, now confirmed by Statute, by which trustees are authorised to expend the income of a trust fund in the maintenance of children whose shares in the trust fund have not yet vested, and may never

do so, cannot find direct application in the Roman Law, since the trust is unknown to that system. But there are at least two analogous cases. The *Edictum Carbonianum* deals with the case in which the allegation is made that a child put forth as *heres* is not really the child of the deceased at all. There is a machinery for investigating the question and for dealing with the estate in the meantime. One of the rules established is that the child is in any case to be provided with maintenance out of the estate, without any obligation to account, no matter how the point is ultimately decided. It is obvious that this may involve maintenance for a considerable time, for the decision will not be made, finally, till the child reaches puberty (D. 37. 10. 5. 3). The whole institution is a juristic inference drawn by Ulpian, from another edictal rule dealing with the case of an unborn *heres*. Where a *postumus suus heres* is expected, the mother is entitled to maintenance out of the estate, but no more, though it is indifferent whether or no she is otherwise provided for. Though no child be born, there will still be no duty to account, the point being made that it is not in the interest of the mother, but rather in that of the potential child (D. 37. 9. 1. 19–21, 27; D. *h. t.* 3; *h. t.* 5). Even if it is a *postumus extraneus*, the mother is entitled to maintenance, if she is not otherwise provided for, lest the unborn child suffer. The reason given in both these cases is that it is more important that the child should not be destroyed

than that the inheritance should reach the other person entitled without diminution (D. *h. t.* 6).

XV. *Charities.*—Most of the special rules of law applicable to charities have no possible application in Roman Law, since they turn largely on the distinction between realty and personalty, which plays but a small part in that system. Of the devices which were resorted to in order to secure so far as possible perpetual endurance to endowments for public and charitable purposes we have already spoken. It must be noted that here too they were specially favoured, for it cannot be supposed that the administrative machinery was available for private purposes.

There is a rule, something like the cy-près doctrine, applicable where money is left to a town, and the testator indicates the purpose to which he desires it to be put. In general the community must apply it to that purpose and no other, but if there proves not to be enough for the purpose, owing, for instance, to its having been cut down by the operation of the *lex Falcidia*, it may be put to some other public uses, such as benefit the community as a whole. So too where it was for the purpose of certain public games, upon which the Roman Senate had forbidden the community to spend any money, it can be treated in the same way (D. 33. 2. 16; D. 50. 8. 6). This is not a favour to the municipality: if it had been a private legatee, and the purpose had been impossible, then, whether there had been an actual condition, or

only as in this case, a *modus*, the legatee would have taken the gift free of any obligation at all (D. 35. 1. 3. *h. t.* 37. See Pernice, *Labeo* 3. 1. 36).

The subject of the foregoing chapters is one with little actuality in it. It is a historical matter: the anticipations of English Equity notions in the Roman Law. In a great proportion of the law schools in English-speaking countries, the Roman Law has a place in the course of study. But, at least as a subject of examination, it can hardly be said to be making way. The opinion is not unfrequently expressed, that the Roman Law is of no use as part of the intellectual outfit of a lawyer, in countries which are governed by the Common Law. Even in Germany, the headquarters of the study of the Roman Law, the codification of the law has had the effect of putting the Roman Law itself into a subordinate place in the curriculum. It has become a branch of historical study. With us it has always been so, and not altogether a branch of the study of our own history, for the direct influence of the Roman Law on our own system, though it has, no doubt, been considerable, is not kept mainly in view in our Law Schools. In Germany it is of course substantially domestic history, for the Roman Law has for centuries been in force in Germany, and can still be traced on almost every page of the new Civil

Code—the Bürgerliches Gesetzbuch. It might be thought, and indeed it has been thought, that the enactment of this Code, with the accompanying supersession of the Roman Law as such, would put an end to the activity of German scholars in the study of Roman Law, a field in which they have achieved more than all the rest of the world. In the long run it may be so, but it is not so as yet. It is a noticeable fact that the decade which followed the coming into force of the new Civil Code has seen at least as great an output in Germany of the results of research in this field as any previous decade.

The fact that the subject has become historical does not involve the consequence that it has ceased to be legal. No man but a mathematician could write a history of mathematics, or estimate the influence of mathematics on modern life. No man but one acquainted with the system could write a history of the Roman Law or give an adequate account of its influence on our civilisation. What will happen when the last generation of those scholars who were trained under the old system, and thus were Roman lawyers perforce, has disappeared, is matter of conjecture, but it is greatly to be hoped that the intellectual activity of Germany will not for many long years cease to exercise itself on the study of that great system which has been a factor of such overwhelming importance in the building up of their civilisation. The German Empire has in some

sense repealed the Roman Law, but perhaps it was the welding influence of the Roman Law which made the Empire possible, in spite of differences of race and religion.

One result of the changed point of view may be worth noting. Till 1900 the law which it was of most importance to know was the law of Justinian's Codes. What Julian or Diocletian appeared to say was material, for it was the law. What they had in fact originally said was matter of secondary interest. But for the German scholar this is no longer true, and the work of reconstructing the classical law which lies behind the Digest, a work in which a great deal had already been achieved, has been pursued of late with extraordinary vigour and success, though, naturally, sometimes with more vigour than discretion. The task is very far from ended, and the almost innumerable differences of opinion which existed among the classical lawyers may be fairly matched by the almost innumerable differences of opinion which now exist as to what individual Roman jurists actually taught. Issue is joined on almost every point.[1]

[1] This is hardly the place in which to illustrate these differences, but the reader will find a curious and not altogether uninstructive specimen of these differences of opinion if he makes some attempt to ascertain what has been thought by modern commentators on the merits of the jurist Paulus, regarded as a lawyer and as a writer. He will find that on either matter it would hardly be possible to frame an opinion which is not to be found in substance in some book of established authority. For some he is the greatest of

It seems clear that this at best stationary position of Roman Law in our scheme of education does not indicate a lessening of the esteem in which the Roman Law, as an intellectual product, is held, or in the interest it has for scholars. Our text-books on English law contain an increasing and increasingly illuminating use of illustrations from Roman Law, and the general text-books on Roman Law written for the use of students, represent a far higher standard of knowledge than those which were available for their predecessors of thirty years ago. Very few of the books then in use are now obtainable. With regard to the more scholarly books now in their hands, it is interesting to note that, so far as the older universities are concerned, very few of them have been produced by men who, as undergraduates, were law students. The writers have come over from other faculties. The inference may perhaps be drawn that, while the Roman Law is interesting to the made lawyer, it is not, at any rate as taught, interesting to the student.

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lawyers, for others an acute critic, for others a pure compiler. For some he is obscure and involved, for others obscure from compression, for others particularly clear and lucid. These differences of opinion are not of course on points of doctrine, but the case will at least suggest that there is still a good deal to be done in reconstructing the classical law. (As to matter, see *e. g.* Esmarch, *Rom. Rechtsg.*, 375; Karlowa, *Rom. Rechtsg.*, i. 745; Krueger, *Gesch. d. Qu.*, 203, 224; Kipp, *Gesch. d. Qu.*, 121; Ihering, *Besitzw.*, 13; Cuq, *Inst. Jur*, 57; Kalb, *Roms. Jur.*, 135. As to style, see *e. g.* Salkowski, *Rom. Pr. l.*, trans. Whitfeld, 53; Hugo, *Gesch. d. R.R.*, 890; Karlowa, *loc. cit.*; Muirhead, *Rom. Law*, 63; Ferrini, *Stor. d. Fonti*, 85; Girard, *Manuel*, 64; Kalb, *loc. cit.*)

Perhaps it cannot be made interesting to the unformed student's mind. However this may be, the writers who have done most for our students are those who have reached the study of Roman Law through the study of Latin literature generally, many, if not most, of them having been English lawyers before they were Roman. It is of course to lawyers especially among Englishmen that the Roman Law is likely to be interesting, since they can see through the obscuring medium of a totally different arrangement the underlying similarity of thought.

This similarity is not a similarity of legal institutions: it exists in defiance of the widest divergences in what may be called the mechanical structure of the law. It appears, as it has been sought to show in the foregoing pages, in doctrines and principles which were established by the jurists without express legislation, and within the existing framework of the law, principles by means of which they modified the working of institutions with which they had to reckon, and made their operation conform to the needs of an increasingly complex civil life. The equitable remedies which we have considered are in the main of praetorian origin, but, apart from remedies, the notions with which we have been concerned may be said to have been independent of the Praetor. They belong in great measure to an age in which the Praetor has ceased to be an agent in legislation. Their significance lies in the evidence they afford of the fact that ways

of legal thinking are very much alike, however different may be the legal systems concerned, that Papinian and a modern leader of the Bar are of the same breed, and that however true may be Austin's proposition that Law is the command of the Sovereign, it is a most inadequate account of the matter.

No attempt has therefore been made to show any actual affiliation: for obvious reasons those cases have been preferred in relation to which no such affiliation can be made out. They are for the present purpose clearly the most significant. But, in fact, direct descent can rarely be shown. The earlier reports of Cases in Chancery are usually extremely short, consisting of no more than a catch-word, followed by a brief abridgment of the decree, or, often, no more than a pregnant phrase. There is nothing like the Year-Books to help us, and the bundles of Bills in Chancery, in part as yet uncalendared, and even unindexed, for the most critical period, are of little help in their present condition. Some examination of a few of them for the latest years of Henry VIII suggests that they would in no case tell us much about this matter.

Most of our students begin and end their real study of the Roman Law with the Institutes of Justinian. It may be treason to say so, but to one reader at least that work seems a very dull book. It is a statement of no more than the beggarly rudiments of the Roman Law, as a series of dog-

matic propositions of fact, with scarcely anything in the way of reasoning, and very little more in the way of historical exposition. It is only made tolerable to students by a considerable amount of explanation and amplification in the form of notes and commentary. But that is exactly what an elementary account of the law ought not to want. If it is a good first book it ought itself to tell the story it sets out to tell. Amplification it will of course need if it is to be more than a mere first book, and our modern English editions provide this. But it is, as it seems, only in this country that the fashion has been preserved of using the Institutes as a sort of skeleton, or outline, by means of comment on which an account is to be given of the main ideas of the Roman Law. On the Continent another method is nowadays followed. The modern writer sets forth his view of the Roman Law and supports it by judiciously chosen texts not necessarily from the Institutes, but thence, and from the Code, Digest and elsewhere. This is the method adopted by Sohm and by Girard, and it is that adopted in this country by Mr. Roby, who has shown the way in this matter as in some other branches of learning.

But the Digest is far from a dull book. It is no doubt much less scientific than a modern code, but it is very much more readable. Its propositions and illustrations have an air of life. Moreover, it contains, in a truncated and terribly mutilated form indeed, the actual thoughts of

that series of great men whose work, as Professor Vinogradoff (*Roman Law in Mediaeval Europe*) has told us, has played such an enormous part in the moulding of our modern civilisation. It is the main record of the one great intellectual legacy left us by the Roman Empire. No doubt it is, as has been said, like a Roman mediaeval palace, a stately edifice, but vastly inferior to the materials out of which it is built. It is, however, the one source from which we can hope to learn not merely the rules of the law, but something of the way of thought of the Roman lawyer. There is something to be said for the opinion that if the student were to save three-quarters of the time he now gives to the Institutes, by contenting himself with a general knowledge of the text itself, without amplification, and were to give the time thus rendered available to the study of half-a-dozen or so of the principal titles of the Digest, with the help of modern monographs on the subjects he would have a far more real and fruitful knowledge of the Roman Law than he acquires under the present system.

But there are two ways of studying the Digest. For the purpose of the scheme of study here suggested, the most difficult texts are not the most valuable. Such a text, for instance, as the famous "*Frater a fratre*" (D. 12. 6. 38) is of little use to the student. It is so difficult that any study he can make of it will only bring him to the point of having to choose between a number of alternative

solutions which have been offered, a choice which he is not really qualified to make, and which is in fact usually made for him by his teacher. So, too, every teacher knows that in the detailed study of any one title much time is spent on texts which are corrupt, in all likelihood unimportant in themselves, but terrible stumbling-blocks to the student. Of course texts which have been " interpolated " are on a different footing. They are often of first-rate importance. Indeed, a student who takes a single page of Krueger's recently published edition of the Digest, and accounts to himself for the practically universally admitted interpolations there indicated, must either have brought a good deal of knowledge to his task, or have learnt a great deal in the process. Detailed study of every text in a title is not, for the purpose in view, the wisest course. The student should aim at a knowledge of the principal doctrines expressed in the title, and of the reasonings of the lawyers on which they are based. Such a method makes a greater demand on his teacher, but if the student is intelligent, it will produce a greater interest in the principles of the law.

There is room for difference of opinion as to the qualities of the Roman Law which gives it its value for us. According to one view, this is due to the superlative excellence of the system itself : it is to be regarded as a model. But, apart from the fact that what might well be a model system

for one civilisation might be entirely unsuited to another civilisation developed under different conditions, it may perhaps be doubted by those who have formed some acquaintance with both systems, whether, as compared with Common Law, the Roman Law does in fact possess any superiority. But a craftsman may well learn something from one not superior to himself, and the advantages of the study of Roman Law do not depend on this alleged superiority. Again it may be said that we can learn a great deal by the comparison of our own institutions with those which have developed independently elsewhere. This way of looking at the matter seems nearer the truth, but it still leaves something unexplained. Is it the institutions themselves which are of primary importance to us? Perhaps it is not these, but rather the way in which these institutions were handled and developed by the lawyers, which forms the most useful subject of study. If any one takes a complicated group of facts and, without attempting to solve the legal questions they raise, merely states the legal possibilities as they present themselves to an English lawyer, and then deals with the same facts in the same way from the point of view of a Roman lawyer, and thereupon proceeds to consider his two sets of legal questions, without reference to the facts which gave rise to them, he will find the sets of questions astonishingly different. The difference will often be so great that a person

acquainted with only one of the two systems would hardly guess that the same set of facts had given rise to the two sets of questions. A system of law in which a life estate is a servitude, which attaches little importance to the distinction between land and other forms of property, in which theft is commonly treated as a civil injury, in which a real action is an action to enforce a *ius in rem*, must look strange and unintelligible to an English lawyer who is not informed of these and other fundamental differences. Austin, indeed, appears to have put all the divergence down to ignorance on the part of the Romans, but perhaps Austin's summary judgments are nowadays open to review. The notions of the Roman lawyer are cast indeed in a different mould, but when the reader has made his account with these differences, which have to do mainly with the external framework, he will find much more resemblance than difference. The legal logic of the classical Roman lawyer is much the same as that of the English lawyer: the practical needs which he has to serve are in most cases identical. It is not, therefore, surprising to find that when his solutions are translated into English forms, they prove often to be much the same as those at which the English courts have arrived. There is one very familiar and very striking illustration of this. When we are set to compare the Roman and the English laws of Sale of Goods, one of the first things we learn is what seems to be a profound difference. We

learn that while in our law the contract of sale of goods is also a conveyance, this was not so in the Roman Law. In that system there was need of a further definite act of transfer. The amount of edification which can be derived from knowledge of this fact is not very great, though it does bring out the care with which the Romans kept distinct the notions of actions *in personam* and actions *in rem*. But the matter grows more interesting if we go a step further, and learn that, notwithstanding this apparently fundamental difference the two systems give in relation to the most practically important points, much the same results. In our law the buyer is owner before delivery: in the Roman Law he is not, but in both systems the risk of accidental damage or destruction is on the buyer from the moment of the making of an unconditional contract for specific goods. In one respect this is an unfortunate illustration, because to the question that at once suggests itself the sources give no answer. How did the Romans arrive at this at least apparent exception to the principle: *res perit domino?* They themselves give us no answer, and the defect has been made good by modern commentators in a bewildering variety of ways, of which good accounts can be gathered from Girard (*Manuel*, 544, *sqq.*) and Dernburg (*Pandekten*, II, § 96). So far as these explanations rest on historical grounds, they can hardly be called explanations at all. If the rule survives

from a time when it was quite logical, a view which in various forms is held by many of those who regard it as illogical in the classical law, the real question of interest is: why, then, did it survive? To that question juristic principle can hardly give any answer but the rather unsatisfactory one of conservatism. The real answer is to be found elsewhere: it survived because it corresponded to the needs of commerce. The Roman Law, like the English, is as opportunist as a politician. The Roman lawyers "knew the season when to take Occasion by the hand" as well as Lord Mansfield did. Their law, like our own, was never exactly logical, but it was always on the way to become so. In it, as in our own system, there was a continual breaking down of old generalisations and substitution of new ones. Some of us were brought up in the belief that in the Antonine age there existed in Rome a magnificently logical system of law, beautifully worked out by a series of consummate lawyers working in complete harmony on a set of rather arbitrary "notions, principles and distinctions" handed down from a remoter age, that in later days these ancient principles were more or less forgotten, the logical system was destroyed, and superseded under Justinian by a highly utilitarian structure, in the erection of which no regard was had to scientific harmony or artistic symmetry. Of course there is some truth in this. Few people who have worked at the Digest in modern times

have risen from their work with much affection for Tribonian. But, as a picture of what really happened, it is hopelessly wide of the mark. There never was—there never could have been—a logical "classical law." It has of late years become increasingly clear that the age of the great lawyers was an age of rapid development of law, an age of continual dispute and controversy. There is hardly an important topic on which many and wide differences of opinion amongst the jurists cannot be found. The latest of them are no more agreed than the earliest. The battle ground is of course continually shifting, but the controversy goes on. If, as may have been the case, there was little of this in the fourth and fifth centuries, this was not because general agreement had been arrived at, but because from one cause or another the Roman Law had ceased to develop, which is the same thing as saying that it had ceased to be the chosen study of the greatest men. Any title of the Code will show that doubts on points of, as it seems, the most elementary kind, were constantly arising and being settled by imperial enactment. No doubt these later emperors were advised by lawyers, but the fact that Theodosius in the fifth century and Justinian in the sixth, both disregarded their work, shows that they must have been of a lower type.

Even if we did not know from the texts that the age of classical law was an age of disputation we should know that it must have been so. No

worse compliment could be paid to the lawyers of the great age than to suppose that they were all of one mind. It is towards the study of their reasonings, towards the working out of their controversies, for which the Digest gives us plenty of material, though much of it is not over-trustworthy, that that book renders its greatest service to the student. The real value of the Roman Law to us is not its provision of rules, though the Middle Age thought them sufficient for any possible contingency, but the evidence it gives us of the way in which these rules were arrived at. But this is what the student who reads only the Institutes never gets. A general statement of the main rules of the system is of value to him, as indeed is a general knowledge of the main rules of the Code Civil, or of the Bürgerliches Gesetzbuch. But it is of no more value than these, and for the modern student it is much more difficult to get. The real value of the Roman law books, to us, over those of any other foreign code lies in the fact that nowhere else can we see so well, in such small compass, how the lawyers operating with a given set of rules, went to work to make their law satisfy the needs of an advancing civilisation.

If this view of the real value of the Digest to us is correct, another conclusion follows from it. It must not be assumed as a matter of course that those titles of the Digest are of the greatest value which deal with topics most prominent in our law. There is an obvious advantage in choosing these,

other things being equal. But other things are not necessarily equal. Those subjects will be the best in which the Roman lawyers were most active. To a great extent the two classes will be the same, and the small number of titles on which monographs have been written for English readers, *e. g.* Sale, Damage to Property, and Life Interests, might very well have been chosen from whichever point of view the writer started. But the list might be almost indefinitely widened if it was understood that the object was not to give the student an exact and detailed knowledge of the law of the subject, but an insight into the lawyer's method of work. By way of illustration the remark may be permitted that no topic could be more remote from modern needs than the law of slavery, and yet it is full of the most interesting legal problems, discussed most elaborately in the sources. But indeed the law of slavery is not so much a branch of the law as an aspect of it. To take a narrower field, the law of contracts made by slaves is full of the most interesting points, rendered all the more interesting to us because it is developed by a set of lawyers to whom the notion of representation, as we know it, is almost a contradiction in terms. Here, too, starting from an entirely different standpoint, and never accepting the notion of representation, the Praetor and the lawyers between them arrive at a set of rules, which give in commercial relations practical results very like our own.

The Roman Law has the other point of interest that it is in the Western world the only rival of the Common Law. In many places it has been codified, and in Germany it has been in great part abandoned, in favour of Germanic ideas. But it is still in the main true that these two systems, or sets of ideas, divide the civilised world. It is sometimes said that the peculiar excellence of these two systems of law is evidence that the nations which produced them have had a special genius for law. In view of the fact that a refined system of law is an intellectual product, and of the fact that both races concerned have been essentially races given to action rather than to reflection, this seems a doubtful account of the matter. It cannot be denied that the Roman Law is far more skilfully elaborated than the Attic Law, and yet no one will contend that the Romans were a more intellectual people than the Greeks. No doubt it had a longer time in which to develop, but the great Roman lawyers do not cover more than three hundred years. Still, it is in this steady development that the secret lies. The Romans, like the Anglo-Saxons, possessed a genius for administration, from which sprang in great measure the long continuance of their great empire, which affords such a striking contrast to the history of Greek conquests. But they had another closely connected gift, to which the merits of their law are mainly due. They had a gift, again like the Anglo-Saxons, for being administered. They were

on the whole an orderly, law-abiding people. No doubt this is hardly the impression which is at first derived from the writings of the Roman historians of the early empire. But it is evident that the alarums and excursions which fill so great a place in their pages filled relatively little in the workaday life of the nation. It was the *Pax Romana* which made the law. It was no doubt an earlier age which provided the great legal conceptions : these are bound to appear in the earlier days of a developing civilisation. But it was the Flavian and Antonine lawyers, who by their work on these conceptions created the law which we study.

In a community in which the law is habitually observed and its oracles are held in honour, it is worth the while of powerful minds to devote themselves to its elaboration. With the end of the *Pax Romana* came the end of the great lawyers. The last person of whom we know that he possessed the *ius respondendi*, and of him we know nothing more, was one Innocentius, of whom we are told that Diocletian—or perhaps Constantine —conferred it on him (see Glasson, *Étude sur Gaius*, 102). Rome was the great market for brains, and a little examination of the personal histories of the lawyers will show that the law owes its greatness by no means exclusively to Romans in any narrow sense of that word. If the primitive Roman Law may fairly be called Graeco-Roman, as being filled with ideas either

derived from or held in common with the Greek tribes; if that name may also be justly applied in another sense to the law of the Eastern Empire in Byzantine times; there is yet another sense in which it may be with no less justice applied to the classical Roman Law itself. Not merely were the jurists soaked in Greek Philosophy, but that law was, in the main, the work of men of Greek, or at least Oriental origin, whatever may have been their race. If we look carefully at the list of known jurists we shall see that very few of the greatest among them came from the central part of the Empire. The so-called Law of Citations of Theodosius gives the names of five jurists who are to have a special prae-eminence. Of these five, Ulpian undoubtedly came from Tyre. Gaius, according to the dominant view, now somewhat strengthened by a recent monograph by Professor Kniep of Jena, came from a Greek province. Kniep makes it out to have been Bythynia, and holds that Gaius taught at what was afterwards Constantinople (Kniep, *Der Rechtsgelehrte Gaius* §§ 3, 4). Papinian seems to have been from Syria, at any rate he married a Syrian lady. Modestinus, whose work is mostly in Greek, no doubt belonged to a Greek province. Only Paul is left, and of his origin nothing whatever is known. Of the great jurists not in that list, Julian and also Tertullian came from the province of Africa. Tryphoninus was from Antioch. Callistratus was from somewhere in Greece, and both Maecianus

and Marcianus are under suspicion of Oriental origin. If the work of these men were removed from the Digest, not much of first-rate importance would be left. The influence of the Greeks in this great development of law is another confirmation of Maine's generalisation: "Nothing moves that is not Greek."

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